No. 2354

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. H. PETERSON,

Appellant,

vs.

R. L. SABIN, as Trustee of the Estate of the ROHRBACHER AUTOMATIC AIR PUMP COMPANY, a Corporation, Bankrupt,

Appellee.

In the Matter of ROHRBACHER AUTOMATIC AIR PUMP COMPANY, Bankrupt.

Transcript of Record

Upon Appeal from the United States District Court for the District of Oregon.

[Creditor's Proof of Claim and Letter of Attorney.]

In the District Court of the United States for the District of Oregon.

IN BANKRUPTCY.

In the Matter of ROHRBACHER AUTOMATIC AIR PUMP COMPANY, a Corporation, Bankrupt.

At Portland, in said District of Oregon, on the 8th day of October, A. D., 1913, came J. H. Peterson, of Portland, in the county of Multnomah, in said District of Oregon, and made oath, and says that the Rohrbacher Automatic Air Pump Company, a corporation, the person by whom a petition for adjudication of bankruptcy has been filed, was at, and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of $3,000, with interest thereon at the rate of eight per cent per annum from October 29, 1912; that the consideration of said debt is as follows, to wit, the sum of $3,000 advanced by deponent to said Rohrbacher Automatic Air Pump Company on or about October 29, 1912, which indebtedness is evidenced by a note in words and figures as follows, to wit:

"3000.00. Portland, Oregon, October 29, 1912.

Six months after date, without grace, ROHRBACHER AUTOMATIC AIR PUMP COMPANY, promises to pay to the order of J. H. PETERSON, at United States National Bank, at

Portland, Oregon, Three Thousand Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of eight per cent per annum from date until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, Rohrbacher Automatic Air Pump Company promises and agrees to pay in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

[Corporate Seal]

ROHRBACHER AUTOMATIC AIR PUMP COMPANY,

By M. A. HETRICK,

Secretary." [1*]

And the original thereof is hereto attached and made a part hereof. That no part of said debt has been paid; that there are no setoffs or counterclaims to the same, and that the only securities held by this deponent for said debt are the following: A chattel mortgage dated October 29, 1912, and executed and delivered by said Rohrbacher Automatic Air Pump Company to deponent, wherein and whereby said Rohrbacher Automatic Air Pump Company granted, bargained, sold, assigned and con-

*Page-number appearing at foot of page of original certified Record on Appeal.

veyed to deponent, certain goods and chattels then, ever since, and now being located on the premises known as No. 173 East Water Street, in the city of Portland, Multnomah County, Oregon, being all of the property owned by said mortgagor, and consisting of machinery, tools, equipment, supplies, office furniture, fittings and safe, and also the goodwill of the business conducted by said bankrupt and any and all patents owned by it and its contracts and royalties; but affiant does not hereby intend *to or* waive any security he has for this debt.

(Sd.) J. H. PETERSON,
Creditor.

Subscribed and sworn to before me this 8th day of October, 1913.

[Seal] (Sd.) M. M. MATTHIESSEN,
Notary Public for Oregon. [2]

[Letter of Attorney.]

[Title of Court and Matter.]

To M. M. Matthiessen:

I, J. H. Peterson, of Portland, in the County of Multnomah and State of Oregon, do hereby authorize you, or any of you, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter or at such other place and time as may be appointed by the Court for the holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then

and there from time to time, and as often as there may be occasion, for me and in my name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for me to assent to such appointment of trustee; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due me under any composition, and for any other [3] purpose in my interest whatsoever, with full power of substitution.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed my seal the 8th day of October, A. D. 1913.

(Sd.) J. H. PETERSON.

Signed, sealed and delivered in the presence of

.....

Acknowledged before me this 7th day of Oct., A. D. 1913.

[Seal] (Sd.) P. P. DABNEY,
Notary Public for Oregon.

[Endorsed]: Creditor's Proof of Claim and Letter of Attorney. Filed Nov. 19, 1913. A. M. Cannon, Clerk. U. S. District Court. [4]

[Title of Court and Matter.]

[Exhibit "A" to Petition for Revision—Stipulation of Facts.]

It is hereby stipulated and agreed by and between R. L. Sabin, trustee of the estate of Rohrbacher Automatic Air Pump Company, a corporation, bankrupt, acting through his attorney of record, Sidney Teiser, and J. H. Peterson, acting through his attorneys of record, Wood, Montague & Hunt, that the following facts are, and are stipulated and admitted to be true in the above-entitled cause, and that no further proof of the same need be introduced at the trial of said cause, and that they shall be accepted as agreed facts and that this stipulation be, and the same hereby is made a part of the record in the above-entitled cause now pending before the referee in bankruptcy for the district of Oregon; that it can be used upon any trial of this cause in said referee's court, or in the District Court of the United States for the District of Oregon, or in any Appellate Court, the same as if written and oral testimony thereof had been introduced, after witnesses duly sworn, and the calling or swearing of witnesses or the introduction of written proof to prove the same is hereby expressly waived.

I.

It is stipulated and agreed that on or about October 29, 1912, the Rohrbacher Automatic Air Pump Company being in need of funds, borrowed $3,000 from J. H. Peterson, [5] which was to be applied upon its debts, and that the Rohrbacher Automatic Air

Pump Company was not insolvent at that date, or if insolvent, that J. H. Peterson did not and had no occasion to know or be informed that such insolvency existed.

II.

It is further stipulated and agreed that this mortgage was executed under the authority of the board of directors, pursuant to a duly called meeting, and the minutes of that meeting, so far as pertinent, read as follows:

> "Upon motion . . . . duly seconded . . . . it was thereupon unanimously resolved that this company . . . . give to J. H. Peterson the mortgage of the company covering all its assets, including its leasehold, its patents and good will and royalties, to secure said loan, and authorizing and directing M. E. Hetrick, secretary of the company, to execute in the name of the company, under its corporate seal, such note of bond and mortgage. . . . . "

III.

It is further stipulated and agreed that the copy of the mortgage hereto appended and marked Exhibit "A" is a true and correct copy of the original mortgage and of the whole thereof, and that the original mortgage was duly executed and delivered for a consideration of $3,000 in cash paid by the said J. H. Peterson, and that J. H. Peterson is the owner and holder thereof and of the original note, and that a true and complete copy of said note appears in said mortgage and in the copy thereof hereto appended and marked Exhibit "A."

IV.

It is stipulated and agreed that no portion of said note, either of principal or of interest, has been paid, and that the same and every part thereof is now due and payable and remains unpaid. [6]

V.

It is stipulated and agreed that the parties to said mortgage impliedly agreed and consented when said mortgage was given that the mortgagor should continue to conduct its business of manufacturing and selling pumps at wholesale and retail and that such pumps should be made out of materials then on hand, and that the proceeds of such sales, together with the proceeds of the sale of such pumps as were on hand at the time the mortgage was executed, should be used by the mortgagor as it saw fit.

VI.

It is further stipulated and agreed that said power of sale reserved in the mortgagor was not intended to and did not extend to the machinery, tools, equipment, office furniture and fittings or safe, covered by said mortgage. It is further stipulated that the assets of the Rohrbacher Automatic Air Pump Co., at the time of the execution of the mortgage, consisted of the property above mentioned, concerning which there was no power of sale reserved in the mortgagor, and also consisted of numerous pumps already manufactured, and also considerable supplies and materials, a large portion of which were subsequently made into pumps, and which, together with the pumps on hand at the time of the execution of the mortgage, were sold without objection and with the

implied consent of the mortgagee.

VII.

It is further stipulated and agreed that the actual intention with which the mortgage was given was not fraudulent, but by this stipulation it is not intended either to admit or deny that there was not an implied fraudulent intent. [7]

VIII.

It is further stipulated and agreed that J. H. Peterson, at the time of advancing said $3,000 and of accepting said mortgage as security for its repayment, had no actual knowledge that said Rohrbacher Automatic Air Pump Company had any creditors other than those whose claims were to be satisfied by said loan.

IX.

It is stipulated and agreed that said mortgage was duly recorded in the office of the county clerk of Multnomah county, Oregon, on November 6, 1912, and that it ever since has been and now is of record there, and that the same remains unsatisfied.

X.

It is stipulated and agreed that the bankrupt corporation was engaged in the manufacture and sale, at wholesale and retail of air pumps.

(Sd.) WOOD, MONTAGUE & HUNT and
M. M. MATTHIESSEN,
Attorneys for J. H. Peterson.
(Sd.) SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee. [8]

[Endorsed]: Filed Nov. 22, 1913. A. M. Cannon, Clerk U. S. District Court.

Exhibit "A" to Stipulation of Facts—Mortgage.

THIS INDENTURE, made the 29th day of October, in the year of our Lord one thousand nine hundred and twelve, between ROHRBACHER AUTOMATIC AIR PUMP COMPANY, an Oregon corporation, of the city of Portland, County of Multnomah, State of Oregon, the party of the first part, and J. H. PETERSON, of the city of Portland, county of Multnomah, State of Oregon, party of the second part.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Three Thousand Dollars, Gold Coin of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does grant, bargain, sell, assign and convey unto the said party of the second part, certain goods and chattels now being in the premises known as No. 173 East Water Street, Portland, Multnomah County, State of Oregon, and being all of the property owned by the party of the first part and consisting of machinery, tools, equipment, supplies, office furniture, fittings and safe, and also the good will of the business conducted by the party of the first part, and any and all patents owned by it and contracts and royalties and its leasehold interest in said premises known as No. 173 East Water Street, Portland, Oregon.

TO HAVE AND TO HOLD the said goods and chattels unto the said party of the second part, his executors, administrators or assigns forever.

PROVIDED, NEVERTHELESS, and these presents are on the express condition that if the said party of the first part, its successors or assigns, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the sum of Three Thousand Dollars, and interest thereon at the rate of [9] eight per cent per annum in accordance with the terms of one certain promissory note, of which the following is a substantial copy:

[Promissory Note, Dated October 29, 1912, for $3,000.]

$3,000.00 Portland, Oregon, October 29th, 1912.

Six months after date, without grace, ROHRBACHER AUTOMATIC AIR PUMP COMPANY, promises to pay to the order of J. H. PETERSON, at United States National Bank, at Portland, Oregon, Three Thousand Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of eight per cent. per annum from date until paid, for value received. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, Rohrbacher Automatic Air Pump Co. promises and agrees to pay in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees

to be allowed in said suit or action.

ROHRBACHER AUTOMATIC AIR PUMP COMPANY.

[Corporate Seal] By M. E. HETRICK, Secretary.

No. ———

then these presents shall be void. But in case default shall be made in the payment of the said principal sum, or interest or any one of the said installments of the principal or interest, or if said property is attempted to be removed by any one from where it is now situated, or be attached or levied upon by the creditors of said party of the first part, or shall be sold, transferred or assigned, or attempted to be sold, transferred or assigned, then said [10] promissory note shall at once become due and payable, and it shall and may be lawful for, and the said party of the first part does hereby authorize and empower the party of the second part, with the aid and assistance of any person or persons, to enter the place, No. 173 East Water Street and other premises, and such other place or places as the said goods and chattels are or may be placed, and take or carry away the said goods and chattels, and sell or dispose of the same at private sale, with or without notice to said party of the first part, or to sell the same at public auction, upon giving 4 weeks' notice of the same in a newspaper of general circulation, published in said county and state, and out of the money arising therefrom, to retain and pay the said sum above mentioned, and interest as aforesaid, and all charges touching the same, and including a reason-

able sum as counsel fees rendering the overplus, if any, unto the said party of the first part. And the party of the first part may retain and continue in the quiet and peaceful possession of the said goods and chattels, and in the full and free use and enjoyment of the same except as hereinbefore mentioned.

And the said party of the first part does hereby further promise and agree to pay at maturity all taxes, liens or other incumbrances now subsisting, or hereafter to be laid or imposed upon said goods and chattels, and to keep the said property fully insured for a sum not less than $——— during all such time, and in one or more good and responsible fire insurance companies, against all loss or damage by fire; the loss or damage, if any, to be made payable to the said party of the second part; and in case the said party of the first part shall fail or refuse to obtain such insurance, or to pay all taxes, liens and incumbrances aforesaid, before the same shall become delinquent, then the said party of the second part may, at his option, obtain such [11] insurance and pay the premium therefor, and may pay all such taxes, liens and other incumbrances before or after the same shall have become liens upon said property, and all sums of money thus expended are hereby secured by these presents, and shall be repayable on demand from said party of the first part to the said party of the second part and may be retained by the party of the second part from the proceeds of the sale above authorized.

IN WITNESS WHEREOF, the party of the first part has caused these presents to be executed in its

name and under its corporate seal by M. E. Hetrick, its Secretary, in accordance with due resolution of its Board of Directors.

ROHRBACHER AUTOMATIC AIR PUMP COMPANY,

[Corporate Seal] By M. E. HETRICK,
Secretary.

Executed in the presence of:

M. COLPITTS.
P. P. DABNEY.

State of Oregon,
County of Multnomah,—ss.

I, M. E. Hetrick, being first duly sworn, say that I am the Secretary of Rohrbacher Automatic Air Pump Company and am authorized to make this affidavit; that Rohrbacher Automatic Air Pump Company is the sole and exclusive owner of the property described in this mortgage and in the lawful possession thereof; that the same is paid for in full, and that there are no incumbrances or liens of any kind whatsoever existing at this date against said property.

M. E. HETRICK.

Subscribed and sworn to before me this 29th day of October, 1912.

[Notarial Seal] P. P. DABNEY,
Notary Public in and for Oregon. [12]

State of Oregon,
County of Multnomah,—ss.

THIS CERTIFIES, that on this 29 day of October, 1912, before me, the undersigned, a notary public in and for said county and State, personally appeared

M. E. Hetrick, to me personally known to be the Secretary of Rohrbacher Automatic Air Pump Company, the corporation above named, who being first duly sworn, did say that he, the said M. E. Hetrick, is the Secretary of said Rohrbacher Automatic Air Pump Company, the corporation named and described in the within and foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed and executed on behalf of said corporation by authority of its Board of Directors; and said M. E. Hetrick, Secretary as aforesaid, acknowledged said instrument to be the free act and deed of said corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal on this, the day and year in my certificate first above written.

[Notarial Seal] P. P. DABNEY,
Notary Public in and for Oregon. [13]

[Title of Court and Matter.]

Order Disallowing Reclamation Petition of J. H. Peterson Based on Chattel Mortgage.

At a Court of Bankruptcy held at Portland, in the Above-named District, November 13th, 1913, Before CHESTER G. MURPHY, Referee:

This matter comes on for hearing upon the petition of J. H. Peterson, holder of a blanket chattel mortgage in the sum of $3,000.00, upon all of the personal property of the bankrupt estate, consisting of machinery, tools, supplies, office furniture, fittings, safe, and stock in trade, and patent rights and good-

will, and it appearing that said reclamation petition was filed herein Oct. 22d, 1913, and amended petition filed Nov. 8th, 1913, accompanied by stipulation of facts agreed upon by counsel for the Trustee, and brief of J. H. Peterson, in support of reclamation petition, and brief of Trustee in opposition to said petition having heretofore also been filed, and the matter having been carefully considered by the Referee,

IT IS NOW ORDERED that the reclamation petition of said J. H. Peterson be, and the same hereby is, disallowed, leave being hereby granted to said J. H. Peterson to file his claim as a general claim against this estate. [13]

This is the third reclamation petition of similar nature that has been before this Court for determination in the past few months. In the P. J. Snyder case (in bankruptcy No. 2275, United States District Court for the District of Oregon) a similar blanket chattel mortgage on drug stock and sundries and fixtures was held void as to creditors in bankruptcy, upon the ground of constructive fraud, and a similar ruling was made in the case of Re Klorfein (in bankruptcy No. 2250, United States District Court for the District of Oregon), in which latter case petitioner presented a chattel mortgage upon a stock of goods, consisting of groceries, fruit and sundries and fixtures. In both the Snyder and Klorfein cases review of the undersigned's ruling was requested and granted and upon such review, the ruling of the undersigned was sustained by Judge Wolverton. In neither of these cases was there any

charge of actual fraud, and such is the case in the matter of reclamation petition of J. H. Peterson—that is, utmost good faith at all times was evidenced by the mortgagee. The facts in the present case are admitted to be substantially as follows:

The bankrupt corporation, engaged in the business of manufacturing and selling certain patented pumps, to be attached to automobiles for the purpose of inflating tires, when necessary, borrowed from the petitioner herein J. H. Peterson, the sum of $3,000.00 on or about Oct. 29th, 1912, and gave as security therefor its chattel mortgage as aforesaid. The money so borrowed was applied upon the debts of the bankrupt corporation and J. H. Peterson, at the time of making the loan, had no reasonable ground to [14] believe that the mortgagor was insolvent.

While the mortgage was placed of record, the mortgagor was permitted to continue in possession and to make up pumps from stock and materials on hand, sell the same freely, purchase new materials and in all respects continue the business as before the execution of the mortgage in question.

Claimants admit that as to the changing stock of material and equipment and pumps, the mortgage is void as to creditors in bankruptcy, but strenuously contend that as to the machinery and fixtures and furniture, the mortgage should be upheld.

The matter is, to my mind, *res adjudicata,* so far as this court of bankruptcy is concerned, but counsel for petitioner has requested reconsideration of the entire matter upon the theory that there has been

an authoritative decision by the Supreme Court of this State in which a chattel mortgage on a changing stock of goods, and fixtures, was held void as to the stock and valid as to the fixtures, and that therefore this mortgage, similar in character, should not be held void in whole.

The case in question, and relied upon by counsel, in their able brief in support of this petition, is that of Bremer and Company against Fleckenstein-Mayer & Co. reported in 9th Oregon, 266, but a careful consideration and examination of this case leads me to the belief that the contention of counsel for petitioner herein, is not well taken.

In the case under discussion, one Haas was conducting a wholesale and retail liquor business in the city [15] of Portland, and on the 2d day of June, 1879, gave a mortgage to Fleckenstein-Mayer & Company upon his entire stock of wines, cigars and liquors, some bar-room fixtures and other personal property to secure a debt of $4,000.00, and the mortgage was duly filed and recorded on June 6th. Haas, the mortgagee, was left in possession and he continued to sell at retail both for cash and on credit, from his stock of goods. On July 7th, 1879, however, Bremer & Co., a creditor of Haas in the sum of $289.00, brought suit and attached the property in question. Thereupon Fleckenstein-Mayer & Company proceeded forthwith to foreclose and shortly obtained a decree of foreclosure and conducted a sale of the mortgaged property and realized thereon the sum of $1,240.00. Some few days later Bremer & Company reduced their claim to judgment for the

full amount sued for, with costs and interest, and after the clerk of the Court had paid over the proceeds from the sale to Fleckenstein-Mayer & Company, Bremer & Company brought a suit in equity to impeach and set aside the mortgage, upon the ground of fraud and prayed for a personal decree against Fleckenstein-Mayer & Company as Trustee of moneys held for their benefit in the amount of their judgment. After reference to a Referee, the lower court gave judgment in favor of Bremer & Company against Fleckenstein-Mayer & Company for $200.00, and costs, and from this judgment Fleckenstein-Mayer & Company appealed to the Supreme Court, where the judgment of the lower court was affirmed.

Counsel for petitioner Peterson claim that because the Referee found that the changing stock of [16] goods brought $200.00 on foreclosure sale and the fixtures and furniture and other personal property brought $1,040.00, and this finding was incorporated in the decree of the lower court that by implication at least, if not in fact, the Referee held that while the mortgage was void as to the changing stock of goods, that it was valid as to the fixtures, and the Supreme Court having confirmed the decision of the lower court, likewise so held by implication.

But a careful reading of the decision of Judge Watson discloses the fact that the mortgage was treated as wholly void and that the judgment of the lower court was merely affirmed. The Court, upon the appeal of Fleckenstein-Mayer & Company, being in no manner free to give judgment for more than

was granted in the lower court, and I am of the opinion, therefore, that the affirmance of the decree of the lower court, in no way binds the Supreme Court of this State to a ruling to the effect that a chattel mortgage on a changing stock of goods and fixtures is void as to stock and valid as to fixtures.

It is admitted that the validity of a chattel mortgage is determined by the law as laid down by the highest court of the State in which the mortgage was made, and that the law as thus declared by the highest tribunal of the State, will be recognized and enforced in the Federal Courts.

Etheridge vs. Sperry, 139 U. S. 266;

First National Bank of Pittsburg, Pa. vs. Title Guarantee and Trust Company (C. C. A. 3rd Cir., 24 Am. B. R. 330).

There being no authoritative decision of the [17] highest court of this State, and the Federal Court of the United States for the District of Oregon having declared similar mortgages not only collusively fraudulent and void in part but void in whole, there is nothing for this court of bankruptcy to do but to deny the reclamation petition filed herein under the facts above stated, and it is so ordered.

Dated, Portland, Oregon, November 13th, 1913.

(Sd.) CHESTER G. MURPHY,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 19, 1913. A. M. Cannon, Clerk, U. S. District Court. [18]

[Title of Court and Matter.]

Petition for Review of Referee's Order.

To Chester G. Murphy, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is a creditor of Rohrbacher Automatic Air Pump Company, the above-named bankrupt, and that his claim as a secured creditor has been filed herein.

That on the 13th day of November, 1913, an order, a copy of which is hereto annexed, was made and entered herein.

That said order was and is erroneous in that it declares a certain chattel mortgage dated October 29th, 1912, given by said bankrupt to this petitioner to secure the repayment of three thousand dollars ($3,000), with interest, and purporting to cover, *inter alia*, a changing stock of supplies, void *in toto* as to unsecured creditors of the bankrupt, and further in that it fails to declare said mortgage a valid and subsisting lien upon all the machinery, tools, equipment, office furniture and fitting and safe covered by said mortgage.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated at Portland, Oregon, this 17th day of November, 1913.

(Sd.) J. H. PETERSON,
Petitioner.

[Endorsed]: Filed Nov. 19, 1913. A. M. Cannon, Clerk U. S. District Court. [19]

[Title of Court and Matter.]

Referee's Certificate on Review.

To the Honorable CHARLES E. WOLVERTON, and to the Honorable ROBERT S. BEAN, Judges of the Above-entitled Court:

I, Chester G. Murphy, the Referee in charge of this proceeding, do hereby certify:

That in the course of the administration of said estate, an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered on the 13th day of November, 1913, denying as a secured claim the reclamation petition of J. H. Peterson in the sum of Three Thousand Dollars ($3,000.00), based on chattel mortgage on certain assets taken possession of by the Trustee as belonging to said estate.

That on the 18th day of November, 1913, said petitioner J. H. Peterson, feeling aggrieved thereat, filed a petition for a review which was granted.

That a summary of the evidence on which said order was based is as follows:

Petitioner filed his claim in said proceeding as a secured creditor and based his claim thereto on chattel mortgage on machinery, furniture, fixtures and materials. The loan was made by said petitioner in good faith more than four months prior to the institution of bankruptcy proceedings. [20] A full statement of the facts is set out in detail in order,

copy of which is attached to petition for review.

That chattel mortgage in question covered, in addition to machinery and fixtures, a changing stock of merchandise and materials for manufacturing the product of said corporation, to wit, an automatic air pump, and in view of the decision of your Honorable Court in re Klorfein (In Bankruptcy, No. 2250, United States District Court for the District of Oregon), and In re Snyder (In Bankruptcy, No. 2275, United States District Court for the District of Oregon), in both of which cases, upon appeal from the bankruptcy court, your Honors held that a mortgage given in this State on a changing stock of goods and fixtures, void as to the stock, was likewise void as to the fixtures and, therefore, void in whole as to creditors in bankruptcy.

I deemed that this matter was *res adjudicata,* and therefore denied the petition as aforesaid.

The question presented in this review is, in so ruling, did the undersigned err?

I hand up herewith for the information of your Honorable Judges, the following papers:

1st: Petition of J. H. Peterson, claimant.

2d: Stipulated statement of facts.

3d: Brief of claimant in support of petition.

4th: Opposing brief of the Trustee.

5th: Original of the ruling of the undersigned denying the prayer of said petition.

6th: Petition for review.

Dated Portland, Oregon, November 20th, 1913.

Respectfully submitted,

(Sd.) CHESTER G. MURPHY,

Referee in Bankruptcy.

[Endorsed]: Filed Nov. 22, 1913. A. M. Cannon, Clerk. U. S. District Court. [21]

[Exhibit "B" to Petition for Revision—Judgment Affirming Order of Referee in Bankruptcy.]

[Title of Court and Matter.]

[Judgment.]

This cause was submitted to the Court for a review of the order made by the referee in bankruptcy herein, on the 13th day of November, 1913, denying as a secured claim the reclamation petition of J. H. Peterson in the sum of $3,000, based on a chattel mortgage on certain assets taken into possession *of* by the trustee as belonging to said estate;

ON CONSIDERATION WHEREOF it is ORDERED and ADJUDGED that said order of the said referee be, and the same is, hereby affirmed.

Witness the Honorable CHARLES E. WOLVERTON, Judge of said court and the seal thereof, this 15th day of December, 1913.

[Seal] A. M. CANNON,
Clerk.
By F. L. Buck,
Deputy.

[Endorsed]: Filed Dec. 15, 1913. A. M. Cannon, Clerk U. S. District Court. [22]

[Opinion.]

[Title of Court and Matter.]

SIDNEY TEISER, for Trustee.

WOOD, MONTAGUE & HUNT and M. M. MATTHIESSEN, for Petitioning Creditor.

WM. D. FENTON, BEN C. DEY and K. L. FENTON, for the Bankrupt.

WOLVERTON, District Judge:

This case comes here on certificate of the Referee in Bankruptcy for revision. The only question presented is whether a chattel mortgage given covering machinery, tools, equipment, supplies, office furniture, fittings and safe is void *in toto* by reason of the fact as stipulated that the mortgagor was permitted to continue its business of manufacturing pumps out of the materials and supplies then on hand and mentioned in the mortgage, and to sell and dispose of said pumps, together with such as were on hand, at wholesale and retail, as it saw fit, and to use the proceeds arising therefrom without accounting to the mortgagee.

This Court, in a recent case unreported, In re M. Klorfein, Bankrupt, held that such a mortgage was void *in toto*. It is now contended, as it was previously, that the Supreme Court of the State has, in the case of Bremer & Co. vs. Fleckenstein & Mayer, 9 Ore. 266, decided to the contrary, and that this Court is bound by the decision of the Supreme Court. **[23]**

After a careful re-examination of the case, it is

very clear to my mind that the Supreme Court has not so held. The facts briefly in that case are, that one Haas mortgaged to Fleckenstein & Mayer a stock of wines, liquors and cigars and certain bar-room fixtures. A little later Bremer & Co. sued Haas and attached the mortgaged property, and in due course recovered judgment for $289, with interest, and costs taxed at $24.20. Fleckenstein & Mayer attempted to foreclose their mortgage, and the property under the mortgage was sold for $1,240, $200 of that being for proceeds of the wines, liquors and cigars, and the remainder for the fixtures and furniture. This money was paid into the hands of Fleckenstein & Mayer. Later Bremer & Co. brought suit against Fleckenstein & Mayer to impeach the foreclosure decree, they having not been made a party to the suit under which the foreclosure was obtained. Bremer & Co. obtained a decree against Fleckenstein & Mayer for $200 and the costs of the suit. From this decree Fleckenstein & Mayer appealed to the Supreme Court, and the decree was affirmed. This is the reasoning of the Court upon the question presented:

"Here, then, we find Haas, after the execution of the mortgage to appellants, carrying on his business in the same manner as before, selling off the mortgaged stock in trade, and paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its obvious effect was to ward off his other

creditors, and hinder and delay the collection of their demands against him, and the [24] appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld."

The lower court, it would seem, declared the mortgage void as to the wines and liquors, but not as to the fixtures. Hence the judgment for $200 only. But the only question presented to the Supreme Court was whether the mortgage was void to the extent it was so declared by the court below. The question whether the mortgage was void *in toto* was not before the Supreme Court, nor was it decided by implication, as the case was disposed of without necessarily disposing of that question. If Bremer & Co. had appealed and insisted that they should have had a decree for a larger sum against Fleckenstein & Mayer, then the question whether the mortgage was void *in toto* would have been squarely presented. So it is clear to my mind that the Supreme Court has not held that a mortgage covering the two kinds of property is void only as to stock in trade and valid as to fixtures. A very recent case of the Supreme Court of the State (Greig vs. Mueller et al., 133 Pac. 94), has interpreted the Bremer case as holding only that a mortgage given with an understanding that the mortgagor might continue in possession with authority to sell the goods at retail and use the proceeds for himself, was void as to creditors.

Having so construed the holding of the Supreme

Court, I adhere to my opinion in the case of In re M. Klorfein, and therefore declare the mortgage in the present case void *in toto.*

[Endorsed]: Filed Dec. 15, 1913. A. M. Cannon, Clerk. By G. H. Marsh, Deputy. [25]

[Petition for Appeal and Allowance Thereof.]

[Title of Court and Matter.]

The above-entitled J. H. Peterson, conceiving himself aggrieved by the order and judgment made and entered on the 15th day of December, 1913, in the above-entitled court and cause, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which such judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WOOD, MONTAGUE & HUNT,
P. P. DABNEY and
M. M. MATTHIESSEN,
Attorneys for J. H. Peterson, Petitioner.

The foregoing claim of appeal is allowed on this 24th day of December, 1913.

CHAS. E. WOLVERTON,
District Judge.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon, Clerk. U. S. District Court. [26]

[Title of Court and Matter.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that whereas, on December 15th, 1913, at a District Court of the United States for the District of Oregon, in a proceeding depending in said court between J. H. Peterson, petitioner, and R. L. Sabin, trustee of Rohrbacher Automatic Air Pump Company, bankrupt, an order and judgment was made and entered against said J. H. Peterson disallowing his petition in reclamation and his claim as a secured creditor in the sum of three thousand dollars ($3,000) against said Rohrbacher Automatic Air Pump Company, bankrupt; and

Whereas, said J. H. Peterson has obtained an appeal and filed a copy thereof in the clerk's office of this court, to reverse said order and judgment and a citation directed to said R. L. Sabin, trustee of Rohrbacher Automatic Air Pump Company, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, in said circuit, on the 2d day of February, 1914:

Now, therefore, in consideration of the premises, we, J. H. Peterson, as principal, and the United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the state of Maryland, as surety, are held and firmly bound unto said R. L. Sabin, trustee of Rohrbacher Automatic Air Pump Company, bank-

rupt, in the full and just sum [27] of $250.00, to be paid to said R. L. Sabin, his executors, administrators, successors and assigns, and to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is such, however, that if said J. H. Peterson prosecute his appeal to effect and answer the damages and costs, if he fail to make his plea good, then said above obligation shall be void; otherwise to remain in full force and effect.

Witness our hands and seals this 23d day of December, 1913.

J. H. PETERSON. [Seal]
UNITED STATES FIDELITY AND GUARANTY COMPANY, [Seal]
By DOUGLAS R. TATE,
Attorney in Fact.

Approved by
CHAS. E. WOLVERTON,
District Judge.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon, Clerk. U. S. District Court. [28]

[Title of Court and Matter.]

Assignment of Errors on Appeal.

Your petitioner assigns the following as the errors upon which he will rely upon his appeal from the order and judgment made and entered in the above-

entitled court and cause on the 15th day of December, 1913.

Your petitioner believes and alleges said order and judgment to have been erroneous in that:

(1) The Court declared petitioner's mortgage void *in toto* as to creditors of the mortgagor.

(2) The Court failed to hold petitioner's mortgage valid in part as against creditors of the mortgagor.

(3) The Court failed to hold petitioner's mortgage a valid lien upon that property of the mortgagor over which no power of sale with a right to the proceeds had been impliedly given or reserved to the mortgagor.

(4) The Court disallowed petitioner's claim in the sum of three thousand dollars as a secured creditor.

(5) The Court failed to allow petitioner's claim in the sum of three thousand dollars as a secured creditor or at all.

(6) The Court failed to allow petitioner's claim in the sum of three thousand dollars.

(7) The Court affirmed the order of the referee holding petitioner's mortgage void in toto and disallowing petitioner's claim in the sum of three thousand dollars as a secured creditor or at all. **[29]**

(8) The Court affirmed the order of the referee which failed to allow petitioner's claim in the sum of three thousand dollars.

(9) The Court held appellant's chattel mortgage void *in toto* under the laws of Oregon, though it was given with an entire absence of bad faith on the part

of both mortgagor and mortgagee, for the reason that it was void as to a portion of the property therein described over which the mortgagor had impliedly reserved the power of sale with the right to use the proceeds thereof as he saw fit.

(10) The Court made and entered the following order and judgment:

"This cause was submitted to the Court for a review of the order made by the referee in bankruptcy herein, on the 13th day of November, 1913, denying as a secured claim the reclamation petition of J. H. Peterson in the sum of $3,000 based on a chattel mortgage on certain assets taken into possession of the trustee as belonging to said estate;

"On consideration whereof, it is ordered and adjudged that said order of the referee be, and the same is, hereby affirmed."

Wherefore your petitioner prays that the Court allow an appeal from said order and judgment, and that the same be reversed, and that said Court be directed to enter an order and judgment herein allowing petitioner's claim in the sum of three thousand dollars with interest as a secured creditor and declaring petitioner's said chattel mortgage valid as to a part of the property described therein.

WOOD, MONTAGUE & HUNT,
C. E. S. WOOD,
P. P. DABNEY and
M. M. MATTHIESSEN,
Attorneys for Appellant.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon, Clerk, U. S. District Court. [30]

[Title of Court and Matter.]

Citation [on Appeal].

The United States of America,
Ninth Judicial Circuit,—ss.
To R. L. Sabin, Trustee of Rohrbacher Automatic Air Pump Company, Bankrupt:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco in said circuit, on the 23d day of January, 1914, pursuant to a petition on appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the District of Oregon, in the matter of Rohrbacher Automatic Air Pump Company, bankrupt, to show cause, if any there be, why the order and judgment rendered in said judgment affirming the order of the referee and disallowing the petition in reclamation and claim of J. H. Peterson as a secured creditor in the sum of $3,000 against said Rohrbacher Automatic Air Pump Company, bankrupt, and holding a certain chattel mortgage dated October 29th, 1912, executed and delivered to said J. H. Peterson by said Rohrbacher Automatic Air Pump Company, void *in toto,* and of no effect, as in said petition of appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. CHAS. E. WOLVERTON,

Judge of said District Court, this 24th day of December, 1913.

CHAS. E. WOLVERTON,
United States District Judge. [31]

Personal service of the within citation in Multnomah, County, Oregon, on this 24th day of December, 1913, is hereby admitted.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee of the Estate of Rohrbacher Automatic Air Pump Company, Bankrupt.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon, Clerk, U. S. District Court. [32]

[Stipulation That Petition for Review and Appeal may be Heard Simultaneously on Single Record.]

[Title of Court and Matter.]

It is hereby stipulated and agreed by and between the parties hereto that inasmuch as counsel for J. H. Peterson are uncertain whether the proper procedure on review is by petition or by an appeal, that the petition to review the order of the District Court and the appeal therefrom may be heard simultaneously and upon a single printed record, and that such record shall be deemed and be taken as and for a record in both the proceedings by petition for review and on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 22d day of December, 1913.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee.
WOOD, MONTAGUE & HUNT,
C. E. S. WOOD,
P. P. DABNEY and
M. M. MATTHIESSEN,
Attorneys for J. H. Peterson.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon, Clerk, U. S. District Court. [33]

[Title of Court and Matter.]

Praecipe [for Transcript of Record on Appeal].

To A. M. Cannon, Esq., Clerk of the District Court:

Please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, copies of:

Proof of claim filed by J. H. Peterson in October, 1913.

Stipulation of facts.

Order of referee denying validity of petitioner's mortgage.

Petition for review of referee's order.

Certificate of referee.

Order and judgment of District Court thereon.

Opinion of the District Court.

Petition on appeal and allowance thereof.

Bond on appeal.

Assignment of error.

Citation on appeal.

Stipulation that cause may be submitted on one record.

This praecipe.

Dated at Portland, Oregon, this 22d day of December, 1913.

(Sd.) WOOD, MONTAGUE & HUNT,
C. E. S. WOOD,
P. P. DABNEY and
M. M. MATTHIESSEN,
Attorneys for Petitioner, J. H. Peterson.

Personal service of the within praecipe by certified copy thereof is hereby admitted at Portland, Oregon, December 22, 1913.

SIDNEY TEISER,
Attorney for R. L. Sabin, Trustee.

[Endorsed]: Filed Dec. 24, 1913. A. M. Cannon, Clerk. U. S. District Court. [34]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Oregon.

United States of America,
District of Oregon,—ss.

I, A. M. Cannon, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing pages contain a full, true and complete transcript of the files and records of the said court in the matter of Rohrbacher Automatic Air Pump Company, bankrupt, in so far as the same apply to the claim of J. H. Peterson, and

the action and judgment of the Court with respect to said claim, all as the same appear of record and on file at my office and in my custody.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 8th day of January, 1914.

[Seal] A. M. CANNON,
Clerk. [35]

[Endorsed]: No. 2354. United States Circuit Court of Appeals for the Ninth Circuit. J. H. Peterson, Appellant, vs. R. L. Sabin, as Trustee of the Estate of the Rohrbacher Automatic Air Pump Company, a Corporation, Bankrupt, Appellee. In the Matter of Rohrbacher Automatic Air Pump Company, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Received and filed January 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2354.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. H. PETERSON,

Petitioner and Appellant.

vs.

R. L. SABIN, as Trustee of the Estate of Rohrbacher Automatic Air Pump Company, a Corration, Bankrupt,

Respondent and Appellee.

In the Matter of Rohrbacher Automatic Air Pump Company, a Corporation, Bankrupt

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Brief of Petitioner and Appellant

Petition for revision of and appeal from a certain order and judgment of the United States District Court for the District of Oregon.

STATEMENT OF THE CASE.

On October 29th, 1912, the Rohrbacher Automatic Air Pump Company was in need of funds to pay off its then debts and applied to J. H.

right to the proceeds had been impliedly given or reserved to the mortgagor.

(4) The Court disallowed petitioner's claim in the sum of three thousand dollars as a secured creditor.

(5) The Court failed to allow petitioner's claim in the sum of three thousand dollars as a secured creditor or at all.

(6) The Court failed to allow petitioner's claim in the sum of three thousand dollars.

(7) The Court affirmed the order of the referee holding petitioner's mortgage void in toto and disallowing petitioner's claim in the sum of three thousand dollars as a secured creditor or at all.

(8) The Court affirmed the order of the referee which failed to allow petitioner's claim in the sum of three thousand dollars.

(9) The Court held appellant's chattel mortgage void in toto under the laws of Oregon, though it was given with an entire absence of bad faith on the part of both mortgagor and mortgagee, for the reason that it was void as to a portion of the property therein described over which the mortgagor had impliedly reserved the power of sale with the right to use the proceeds thereof as he saw fit.

(10) The Court made and entered the following order and judgment:

"This cause was submitted to the Court for

review of the order made by the referee in bankruptcy herein, on the 13th day of November, 1913, denying as a secured claim the reclamation petitioner of J. H. Peterson in the sum of $3,000 based on a chattel mortgage on certain assets taken into possession of the trustee as belonging to said estate;

"On consideration whereof, it is ordered and adjudged that said order of the referee be, and the same is hereby affirmed."

The errors here specified in various forms raise but a single question, viz: Whether the chattel mortgage is void in toto or simply pro tanto and, therefore, no attempt to argue the various specifications of error separately will here be made.

POINTS AND AUTHORITIES.

I.

The validity of a chattel mortgage will be determined by the law as laid down in the highest tribunal of the State in which the mortgage was made, and the law as thus declared will be enforced in the federal courts.

Etheridge vs. Sperry, 139 U. S. 266, 271.

II.

Where a mortgagee has given the mortgagor an unlimited power to dispose of all the property mortgaged for the use of the mortgagor, the

mortgage is void as to creditors of the mortgagor, even though there was no actual fraudulent intent on the part of the mortgagor or mortgagee.

Lord's Oregon Laws, section 7396.
Wilkins v. Sabin, 31 Ore. 450, 456.
Catlin v. Currier, 1 Sawy. 7, Fed. Cas. No. 2518.

III.

Where the power to dispose of mortgaged property is not co-extensive with the lien of the mortgage, the mortgage is nevertheless void in toto, **if the instrument was given with actual bad faith.**

Grieg vs. Mueller (Ore. 1913), 133 Pac. 94, 95.

IV.

Where the power to dispose of mortgaged property is not co-extensive with the lien of the mortgage and the instrument was given in good faith, the mortgage is void pro tanto only and good as to the property over which no power of sale extended.

In re Kahley, 2 Biss. 383, 386.
In re Kirkbride, 5 Dill. 116, 118.
In re Reynolds, 153 Fed. 295, 297.
In re Soudan Mfg. Co. (C. C. A. 1902), 113 Fed. 804, 809.
Lund vs. Fletcher, 39 Ark. 325, 335.
Goodhart vs. Johnson, 88 Ill. 58, 61.

Lockwood vs. Harding, 79 Ind. 129, 133.

Bullene vs. Barrett, 87 Mo. 185, 189.

Cf. First National Bank vs. Hankampf (N. Mex. 1911), 121 Pac. 31, 36.

Bremer & Company vs. Fleckenstein & Mayer, 9 Ore. 266, 274.

Jones on Chattel Mortgages (4th Ed.), Section 350 et seq.

ARGUMENT.

The facts can hardly be simpler. The petitioner holds a mortgage dated October 29th, 1912, covering the machinery, tools, equipment, office furniture fittings and safe, as well as the "supplies" of the bankrupt corporation. The consideration therefor was and is the sum of three thousand dollars ($3,000) in cash, no part of which has ever been repaid. The mortgage is formally sufficient, and was promptly and properly recorded. It was taken and given in good faith some ten months prior to bankruptcy and at a time when Mr. Peterson had no occasion to and did not surmise that the company was insolvent, nor was it then insolvent (Transcript, page 13). But the very purpose of the loan was to enable the company to pay its debts and continue in business, so that necessarily the "supplies" would be used in the manufacturing operations in which the concern was then engaged.

The trustee in bankruptcy now argues, not

merely that the mortgage is void as to the "supplies" (which we admit), but he has urged that Mr. Peterson should be even further mulcted by declaring the mortgage void in toto, thus giving to the unsecured creditors of the bankrupt the full benefit of the valuable machinery composing the bankrupt's plant and constituting the chief asset of the defunct concern. The result of such a holding obviously would be to deprive the petitioner of all rights which he might have as a secured creditor.

The trustee's position would seem, we believe, unjust if not audacious to a layman; yet since his position has been approved and upheld by the District Court as well founded in law, if not in reason, we proceed to a consideration of the legal aspects of the case in the belief that we can show the legal concept of justice, in this instance at least, to be not unlike that dictated by our moral sense.

The validity of a chattel mortgage will be determined by the law as laid down in the highest tribunal of the state in which the mortgage was made, and the law as thus determined will be enforced in the federal courts. Etheridge vs. Sperry, 139 U. S. 266, 271. Our question, therefore, at the very outset will be: What is the holding of the supreme court of the state of Oregon upon the precise question here involved?

The cases fortunately are few and naturally divide themselves into two groups; first, cases

where the apparent lien of the mortgage and the power of sale and disposition are co-extensive, i. e., where the mortgagee is empowered to sell any and all of the property covered by the mortgage and apply the proceeds thereof to his own purposes; and, secondly, cases where the power of sale reserved in the mortgagor extends to only a portion of the property mortgaged.

Of the first class the leading case in this state is Orton vs. Orton, 7 Ore. 478. There a mortgage had been given upon a stock of merchandise, **and nothing else,** and it appeared from the evidence and the court found that the mortgagee at the time of taking his mortgage had intended that the mortgagor should continue in possession and sell any and all of the mortgaged property just as if no mortgage existed and apply the proceeds to the mortgagor's own use and benefit.

Upon these facts, the court, at page 482, said:

> "We think that where it appears either on the face of the mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor an unlimited power to dispose of the property mortgaged, for the use of the mortgagor, that the mortgage is void as to purchasers and attaching creditors of the mortgagor."

In Jacobs Bros. vs. Ervin, 9 Ore. 52, the only property mortgaged was a part of a stock of goods, apparently farm machinery.

In Aiken vs. Pascall, 19 Ore. 493, the mort-

gaged property consisted solely of a stock of shoes (page 494) and what is of equal importance the court found the giving of the mortgage to have been permeated with **actual fraud** (page 495).

In Fisher vs. Kelly, 30 Ore. 1, the mortgage covered simply a stock of goods, namely, a stock of woolen and other cloth (page 3) and the trial court found that the mortgage was given with the express intention of defrauding creditors (page 15) and that it for that purpose was withheld from record. (Whether or not the withholding from record of a chattel mortgage is a fraud against creditors presents a question upon which there is a conflict of authority, but it obviously is without the range of this brief and of the question herein discussed.)

A stock of furniture only was mortgaged in Sabin vs. Wilkins, 31 Ore. 450, but there the mortgage was upheld and so the case is of little moment here in any event.

Of the second class of cases, those where the power of sale is not co-extensive with the lien of the mortgage, but three have been found.

In Currie vs. Bowman, 25 Ore. 360, a mortgage had been given by the Durand Organ & Piano Company to the defendant Bowman upon its stock of goods and fixtures (page 373). The plaintiff as receiver then brought suit to cancel the mortgage as void against creditors.

The mortgage, however, was held valid in

toto by the supreme court on the ground that though the mortgagor had retained possession and power of sale as to the stock of goods, the mortgagee had regularly compelled a strict accounting of the proceeds of the sale and had applied them in partial discharge of the mortgage debt. That this is the law generally must be conceded, but its application to the facts of the instant case is not seen.

In Grieg vs. Mueller (Ore. 1913) 133 Pac. 94, it appeared that one Howard H. Ford, a dealer in automobiles at Vale, Oregon, had given a chattel mortgage to defendant for the use and benefit among others of First National Bank of Vale, covering one lathe, one drill press, one electric motor, two gasoline tanks, all tools, fixtures, appliances and all stock in trade. Later Ford, having been adjudged a bankrupt, plaintiff was appointed trustee of his estate and brought a suit to cancel the chattel mortgage.

The instrument contained a provision expressly empowering the mortgagor, who was to remain in possession, to sell the property, but required him to account for the proceeds to the mortgagee. Ford continued to sell the goods at retail in the usual way, keeping no specific account of his transactions. He paid his own personal expenses as well as the expenses of the business out of the receipts.

The supreme court held the mortgage void in toto, and why? Was it not because here,

though the mortgage covered machinery and fixtures, the power of sale included within its scope all of the property covered by the mortgage? And further is it not clear that the bank accepted the mortgage with the knowledge that Ford was making it for a fraudulent purpose, and that the bank itself did not in fact care for the mortgage but took it simply to benefit Ford personally, and that the whole transaction was tainted not merely with constructive but actual fraud?

> "We conclude that the mortgage was executed by Ford for a fraudulent purpose; that the Vale Bank accepted it with knowledge of that purpose and for Ford's benefit and permitted him to conduct the business as he had formerly done and for his own benefit and that as to other creditors the mortgage was void."

Neither of these two cases then is authority for the remarkably harsh doctrine that the chattel mortgage given and taken in absolutely good faith and duly recorded is void in toto simply because the mortgagor is allowed to retain possession of the mortgaged property and is permitted to sell a relatively small portion thereof in the course of business and for his own use and benefit and with absolutely no intention upon the part of either mortgagor or mortgagee to hinder, delay or defraud creditors of the mortgagor.

The single case, therefore, which must be taken to have established the doctrine that the mortgage is void in toto in this state, if it be an

established doctrine here, is the case of Bremer & Company vs. Fleckenstein & Mayer, 9 Ore. 266. That there is some general language loosely considered apart from its context which might cause one to consider it to have been the holding of the court that a mortgage void in part is necessarily void in toto may be admitted, but we contend that this is precisely what the court did not hold in that case.

The facts are a trifle involved, but inasmuch as it is felt that the rights of this mortgagee to reimbursement for the $3,000.00 advanced by him will depend largely upon this court's view of the law as laid down in this case, we ask the court's indulgence as we attempt to state the precise holding with some care.

To that end a statement of the facts is necessary. A Portland saloon keeper named Haas, on June 2, 1879, gave to Fleckenstein & Mayer a chattel mortgage upon a stock of wines, liquors and cigars, some bar-room furniture and other personal property to secure a debt of $4,000.00. The mortgage was filed for record on June 6, 1879. Haas, with the mortgagees' consent, remained in possession and continued to sell the stock in trade, namely, the wines, liquors and cigars, at retail, both for cash and on credit, and solely for his own benefit until July 7, 1879, when all of the mortgaged property was attached at the instance of Bremer & Company, unsecured creditors of Haas. On July 8, 1879, the mort-

gagees instituted foreclosure proceedings and on July 21, 1879, the property was sold under this foreclosure proceeding for $1,240.00 in cash, which was paid by the sheriff to the clerk of the circuit court. On July 24, 1879, Bremer & Company, having recovered a judgment against Haas in the attachment action for $289.00, notified the clerk that they claimed enough out of the $1,240.00 remaining in his hands to pay their judgment for $289.00. The clerk having refused to pay them the amount claimed or any amount, Bremer & Company brought a suit to set aside the mortgage and decree based thereon on the ground that it had been made in fraud of creditors.

> "The cause was then submitted to a referee to take the testimony and report his findings of fact, and conclusions of law therefrom. He found: 'That it was understood between defendants Fleckenstein and Mayer at the time of the execution of said mortgage that Haas should continue in his business of retail liquor dealer, in Portland, Oregon, and sell, in the course of business, wines, liquors and cigars, and stock that was included in the mortgage, and replace the same. The proceeds of such sales to be used in the business by Haas, and the remainder paid to the defendants Fleckenstein and Mayer on the mortgage. That Haas so continued and sold, from the execution of the mortgage until plaintiffs' levy, both for cash and upon credit. Fleckenstein and Mayer at the time knew that such sales were being made by Haas.'
>
> "He also found that the value of the

> stock of wines, liquors and cigars, at the time of respondent's attachment, was $200, and the balance of the property, $1,040. As a conclusion of law, he reported the respondents entitled to a decree setting aside said proceedings of foreclosure, and for the recovery of $200 and costs.
>
> "Objections were filed by both parties, but they were overruled, the report confirmed and a decree entered accordingly."

It will be noted first that all of the mortgaged property was attached; secondly, that the stock of liquors, wines and cigars was worth $200, while the fixtures, etc., were worth $1,040.00, and finally that the referee found in favor of Bremer & Company in the sum of $200.00, the value of the stock in trade only, and not for $289.00, the amount of their judgment, though the funds in the hands of the clerk and realized from the sale of the mortgaged property were ample to pay the judgment in full. Yet the supreme court, after modifying the decree as to the amount of interest to be allowed, sustained the trial court in other respects, saying, at page 274:

> "Here, then, we find Haas, after the execution of the mortgage to appellants, carrying on his business in the same manner as before; selling off the mortgaged stock in trade, and paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its

> obvious effect was to ward off his other creditors, and hinder and delay the collection of their demands against him, and the appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld.
>
> "We shall not discuss the testimony so far as it relates to the separate value of the stock of wines, liquors and cigars, as we are satisfied of the correctness of the findings of the Court below on this point.
>
> "The decree of the lower court is erroneous in respect to the rate of interest allowed. Legal interest, not exceeding 10 per cent per annum, was all that could properly have been allowed."

If the supreme court thought the mortgage void in toto why did it not permit Bremer & Company to recover the full amount of its judgment instead of limiting it to the amount at which the stock of goods was valued? Why did they not recover $289 instead of simply $200? We see no explanation other than the court held the mortgage void as to the property over which the power of sale extended, and valid as to the fixtures and other property which were not included within the scope of the power of sale.

If this be a correct interpretation of the case, then we submit that it is not the law of Oregon that a chattel mortgage is void in toto simply because clearly void in part because of the mortgagor's reserved power of sale as to a part of the property and his retention of possession. In

truth it would seem to be the law in this state that the mortgage is valid as to the property outside the scope of the power of sale vested in the mortgagor, though invalid in part for constructive fraud.

At any rate the case does not hold that the mortgage is void in toto, and this court, in the absence of a determination of the question here involved by the state court, must for itself find and declare the law. Therefore, the rational basis of the rule will now be discussed and the holdings of the courts of other states shown.

It may in the outset for the purposes of this case be admitted that where the circumstances show **actual** fraud on the part of the mortgagee, the mortgage will be held void in toto as to creditors; but the question raised upon the facts admitted to be true in this case, is simply whether the wrong of the mortgagee, being purely legal or constructive fraud, vitiates the mortgage in toto.

In Hayes vs. Wescott, 91 Ala. 143, 8 So. 337, it appeared that Williams, a druggist, for a valuable consideration, executed and delivered to the plaintiff a chattel mortgage on his stock in trade and furniture and fixtures. The mortgage expressly provided that the mortgagor should remain in possession and have the power to dispose of the goods in the regular course of business.

The court at page 337 said:

> "The mortgage is confessedly void on its face as to the stock of goods. It is valid as to the fixtures dissociated from the stipulations as to the goods. The sole question presented by this record is whether the fact that the mortgage is constructively fraudulent on its face with respect to the goods avoids it in toto."

After discussing the conflicting decisions in the various states of the Union the court proceeds, in one of the best considered opinions to be found in the books, to discuss the reason for the rule and the foundation for the doctrine, saying, at page 339:

> "We are left, therefore, to choose between the two doctrines on principle, and unfettered by adjudications to constrain us towards either. The case we have involves no evil intent on the part of the grantee, either as a fact proved or as a fact imputed. The law is rather that a conveyance reserving a benefit is void as to creditors, irrespective of the intent of the parties, or either of them, than that the fact of a reservation raises an imputation of evil intent in both. The statute, as well as the common law, seizes upon the fact of reservation or declaration of trust as a basis for avoidance, wholly without regard to the grantor's real purpose, and without regard to the grantee's knowledge, actual or constructive, of, or participation in, that purpose. Hence it is, we think, safe to affirm that the mere fact of a reservation, standing alone, raises no presumption of bad intent in a grantee. There must be the concurrence of other circumstances. A grant by a person not in-

debted to others, and who does not subsequently become indebted to others than the grantee, is of course valid to all intents and purposes, notwithstanding it is made exclusively to the use of the grantor. So a grant, the natural effect of which would be to hinder and delay creditors, is entirely valid, there being no creditors. It follows that a grant to the use of the grantor, or reserving a benefit to him, does not necessarily raise an implication of bad faith in the accepting grantee, much less go to establish actual evil intent in him. To impute or show bad faith in the grantee, whether by construction merely or as a fact, it must appear, in addition to the trust created or benefit reserved on the face of the instrument, that the grantee was charged with inquiry into the purposes of the grant by a knowledge of the grantor's insolvency, or, at least, of the fact that he was indebted. Nothing short of this will suffice to impute to the grantee even that kind of bad intent which rests on legal presumptions. On these principles, Mrs. Hayes, the appellant, cannot be charged with any evil purpose whatever, either actual or constructive. She is not shown to have known of other debts. She is affirmatively shown not to have known of the mortgagor's insolvency. What is there, therefore, in her mind as a fact, or by imputation, to make her a particeps criminis with Williams? What is the evil thing on her part to taint, like the trail of the serpent, this transaction? How can she be holden to a covinous intent, and to its all-pervading and vitiating consequences, when there is not only no direct evidence of its existence, but also no evidence of any fact or circumstance from which the law would presume its existence? She cannot,

> in our opinion, be so holden. All the cases and all the texts, whether they adhere to the one or the other of the doctrines we have stated, proceed on the theory that a conveyance of this sort is bad throughout, because it is tainted—it is infected—by a mental condition of the grantee which imports an element of criminality in the transaction. To criminality actual evil intent is essential. To 'taint' and to 'infect,' as these words are employed, involve, of necessity, the idea of that which is abstractly bad, and in point of fact offensive to the moral sense. The cardinal difference between those cases which hold conveyances which are void as to a part of the property, void as to the whole under all circumstances, and those which require to this result the existence of actual fraud, is that the former presume an evil purpose—a criminal design—in the grantee from the mere fact of accepting a deed containing a reservation, while the latter require some evidence of its existence, as a matter of fact before visiting punishment upon the grantee for entertaining it. We cannot find justification for the position first stated."

This opinion has been thus extensively quoted because it most clearly draws the distinction between the cases where there was **actual fraud** on the part of the mortgagee and those in which the fraud is purely **constructive,** being inferred solely from the fact that a power of sale is reserved over a portion of the mortgaged property.

With this distinction in mind we ask the court to consider the following authorities:

In Davenport vs. Foulke, 68 Ind. 382, the chattel mortgage covered fixtures and a stock of jewelry and the mortgagor had power to sell the stock in the usual course of trade for his own benefit. There was no actual fraud.

The supreme court, at page 386, in upholding the mortgage as to the fixtures, said:

> "In the well considered case of Barnet vs. Fergus, 51 Ill. 352, the Supreme Court of Illinois recognized the doctrine that a chattel mortgage which permits the mortgagor to sell the mortgaged property, and apply the proceeds to his own use, is void, but at the same time held that such a permission to sell only a portion of the mortgaged property did not necessarily render the mortgage void in toto; that the mortgage might still be valid as to that portion of the property which the mortgagor was not authorized to sell.
>
> "The rule laid down in this last-named case impresses us as being both a just and reasonable rule, and as one which we ought to follow."

In Barnet vs. Fergus, 51 Ill. 352, the mortgage was upon printing materials, presses and stock in trade. There was no fraud in fact apparent, but the mortgagor in the course of his business would necessarily use up the stock in trade and other printing material.

The court after recognizing the general doctrine that the mortgage is void as to the stock of goods, at page 355, is reported to have said:

> "But it does not follow, from the principle above laid down, that where a mort-

gage covers different kinds of property, as, for example, a stock of goods in a store, held for the purposes of trade, and a parcel of horses upon a farm, because the mortgagee loses his right to enforce his mortgage as against creditors or purchasers in regard to the goods, he has therefore lost it in regard to the horses. It is to be remembered that the mortgage, in the case supposed, as in the case at bar, is a valid instrument upon its face and at its inception. But the mortgagee may lose his right to enforce it by subsequent acts, and he does so in regard to so much of the property as he permits the mortgagor to keep for the purposes of sale. But such subsequent acts in regard to a portion of the property do not necessarily render the mortgage void in toto. It may become invalid as to a part of the mortgaged property, and remain valid as to the residue. In the case above supposed, because the mortgagee has consented that the mortgagor shall sell his stock of goods, it would be extremely unreasonable to tell him he could not enforce his lien against the horses."

Another well considered opinion is that of Rocheleau vs. Boyle, 11 Mont. 451, 28 Pac. 872, where the mortgage covered fixtures and supplies in a bakery. The court, at page 879, said:

"The good faith of the parties in the transaction was admitted, and the question was, did the transaction, considering the conditions agreed upon between mortgagor and mortgagee concerning the property, or concerning certain portions of it, amount to a mortgage of chattels under the provisions of the statute? The facts are admitted. The mortgagor remained in possession of the property, and, as to the merchandise, he was

permitted, with the knowledge and tacit consent of the mortgagee, to go on dealing with, using, and disposing of his merchandise, and using the proceeds, without reference to the mortgage. When the facts which enter into a transaction are admitted or found, it is a question of law for the court to determine whether the transaction amounted to a mortgage, as provided by statute, or whether it lacked a vital element, touching the whole or part of the transaction. Although parties intended in good faith to make a chattel mortgage, when all the facts are found as to what they did in the transaction, it is a question of law as to whether or not that which was done fulfilled the requirements of the statute in the making of a mortgage. We hold that as to the merchandise one of the vital conditions of the mortgage was removed by consent of the parties, and as to that property the mortgage was without force or effect. * * *

"Upon the second proposition, in view of the fact that the good faith of the parties to the mortgage is admitted, we can find no just ground for holding the mortgage void as to property mentioned therein, other than merchandise. It is not contended that there was any arrangement, understanding or permission allowing the mortgagor to deal with such other property as he did with the merchandise and the proceeds derived therefrom. Where fraudulent intent was not the motive which led to the transaction, a defect by which it loses part of its intended effect is not held to vitiate the whole transaction. In the case of U. S. vs. Bradley, 10 Pet. 360, Mr. Justice Story, expressing the opinion of the Court concerning this feature of an instrument, says: 'That bonds and other deeds may, in many cases, be good in

part, and void for the residue, where the residue is founded in illegality, but not malum in se, is a doctrine well founded in the common law, and has been recognized from a very early period.' "

In Eastman vs. Parkinson (Wis. 1907), 113 N. W. 649, a case similar on its facts to the one here considered, the supreme court in sustaining the mortgage in part, said, at page 653:

"The trend of decisions in recent years is rather against defeating by judicial policy a good faith attempt, characterized by constructive fraud, to give and take a chattel mortgage. The Supreme Court of the United States, in Etheridge vs. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 717, speaking on that subject, said:

" 'Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increasing facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith. * * * The law now generally requires a record of all such instruments. * * * Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? * * * The interests of the general public are not prejudiced by any such transaction between debtor and creditor. Indeed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in ninety-nine cases out of a hundred the taking of possession by a creditor results in closing the business, and turning the debtor out of employment. * * * Existing creditors may of course challenge the good faith of the transaction, but if they cannot dis-

turb an absolute sale when made in good faith, why should they be permitted to challenge a conditional sale if made in like good faith? The fact that fraudulent relations are possible, is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one, unaffected by any settled law of the state, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith.'

"It is by no means certain that the Courts which have held a chattel mortgage wholly void in the circumstances of this case would do so now if permitted to deal with the matter originally. It is quite certain that the Supreme Court of the United States would not so hold, except as bound to do so by its rule as to following the decisions of state courts. No very good reason is assigned in any of the cases so holding, why a person should, in the entire absence of actual bad faith, lose the entire benefit of his security because of his permitting the use of part of it consisting of a distinct class of property, readily separable from the rest, in a way regarded as constructively fraudulent. Why should one, in such a matter, who is not guilty of any turpitude or of violating any written law creating a forfeiture be punished in excess of the utmost possible injury that could occur to others from the technical wrong?"

After discussing the authorities on both sides the Court stated its conclusion, at page 655, thus:

"Without further discussion it is the opinion of this court, that the effect of constructive fraud should not be extended so as to render a mortgage covering two distinct classes of property wholly void merely

> because of its being void as to one of them. We are unable to see any wrong in such a transaction; one where there is an entire absence of any actual intent to commit a wrong, that should, by force of mere judicial policy, be so severely punished as by taking from the mortgagee, not only the property he did not intend to absolutely hold as security, but the other property also."

To the same effect are the following cases, each of which it is hoped and believed will be found in point and worthy of this court's perusal in case of any doubt as to the correctness of our position.

In re Kahley, 2 Biss. 383, 386.
In re Kirkbride, 5 Dillon, 116, 118.
In re Reynolds, 153 Fed. 295, 297.
In re Soudan Mfg. Co. (C. C. A. 1902) 113 Fed. 804, 809.
Lund vs. Fletcher, 39 Ark. 325, 335.
Goodhart vs. Johnson, 88 Ill. 58, 61.
Lockwood vs. Harding, 79 Ind. 129, 133.
Bullene vs. Barrett, 87 Mo. 185, 189.
Cf. 1st Nat. Bk. vs. Hamkanpf (N. M. 1911), 121 Pac. 31, 36.
Cook vs. Halsell, 65 Tex. 1, 6.

In accord with these cases are the statements of leading authorities.

Thus in Wait on Fraudulent Conveyances & Creditors' Bills (3d Ed.), Sec. 194, it is stated that a mortgage void in part is totally void, but this statement is qualified by the author when

he says that "where the fraud is constructive only the Court will uphold the valid provisions of the instrument if it can be done without defeating the general intent."

In Jones on Chattel Mortgages (4th Ed.), Sec. 350, et seq., the doctrine is laid down thus:

> "The rule having the best support is, that a mortgage not actually fraudulent may be valid in part and void in part. * * * A mortgage covering a stock of goods and fixtures, although constructively void as to the stock of goods by reason of the mortgagor's right to continue in possession and sell them, is held binding upon the fixtures as to which the power of sale did not apply."

The leading case in support of the doctrine that the mortgage must be held void in toto is that of Russell vs. Winne, 37 N. Y. 591.

There one Woodward gave plaintiff a mortgage upon "all my flagging, curb and bridge stones; also upon my platform, gutter and coping stones, and all other stones belonging to me and all other goods and chattels now in my yard, store and docks at West Camp." The instrument contained a clause providing that the mortgagor should remain in possession and have the full and free enjoyment of the mortgaged property. At the time of giving the mortgage the mortgagor was engaged in selling stones and also kept a store. It appeared further that he sold goods from the store with the mortgagee's consent and applied the proceeds to his own use.

Upon these facts the court, at page 595, said:

> "The only remaining question is, whether, if the mortgage be fraudulent as to creditors, as to a part of the property mortgaged, it can be upheld as to the residue. As applied to this case, if the mortgage be fraudulent and void as to the goods in the store, is it valid as to the store? The judge charged that it was; thus sharply presenting the point. In this, I think, he erred. The mortgage was one single instrument given to secure one debt. To render it valid, it must have been given in good faith, and for the honest purpose of securing the debt, and without any intent to hinder or defraud creditors. This cannot be true when the object, in part, or as to part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument."

It will be noticed that the court, without any reasoning or citation of authority, presumes a fraudulent intention in the mortgagee simply because of his acceptance of an instrument of grant containing a reservation of power of sale in the grantor, an argument well met by the Court in Hayes vs. Westcott, supra, when it said:

> "Support is sought for it (this presumption) in the maxim which holds all men to have intended the probable consequences of their acts. This is begging the question. It is an unwarranted assumption that the act is itself evil, which it is not, in the absence of notice of indebtedness or insolvency on the part of the grantor. It assumes, also, that the probable consequence of accepting such a conveyance is that creditors will thereby be hindered, delayed, and defraud-

ed, when in truth and in fact that result would not only not be a probable consequence of accepting the conveyance from a solvent man who owed no debts, but would be an impossible consequence; and surely the law cannot and does not indulge the presumption that every man who conveys to his own use, or reserves a benefit out of the thing conveyed, is insolvent or even indebted. The presumption of an evil intent, therefore, in a grantee who accepts a conveyance of property in which a benefit is reserved cannot be indulged in the absence of some further fact than the reservation itself. Without such evil intent, the whole conveyance cannot be said to be tainted and infected; the grantee cannot be put in the category of a particeps criminis with the grantor, of whose bad purposes he was not advised, or even put on inquiry. The law, taking hold of the fact of the reservation in such cases, and not concerning itself with the intent, will annul it as to the property to which it pertains, when the rights of creditors are involved; but if the conveyance embraces other property which is not reserved to the grantor, but goes to the satisfaction or security of the grantee's debt, that is no constructive fraud upon other creditors. They have nothing to complain of with respect to that property, since its disposition does not hinder, delay or defeat them in any legal or just sense, unless that disposition was in consonance, and in the effectuation of, an actual or necessarily imputed evil intent, which taints the whole transaction with actual fraud."

All other cases in accord with the doctrine of Russell vs. Winne, supra, are either cases of actual fraud as distinguished from constructive

fraud or cases which practically without comment follow this case as an authority. Most of the cases, however, show actual fraud. See:

Wilson vs. Voigt, 9 Colo. 614, 619.
Holt vs. Creamer, 34 N. J. Eq. 187.
Greeley vs. Windsor, 1 S. D. 117, 122.

For a comparatively full and scholarly treatment of the question, we would respectfully refer this Court to:

Eastman vs. Parkinson (Wis. 1907), 113 N. W. 649.
Hayes vs. Westcott, 91 Ala. 143, 8 So. 337.
Jones on Chattel Mortgages (4th Ed.), Sec. 450, et seq.

In addition to the purely legal questions it may not be amiss to speak briefly of the facts in this case.

It will be noted, in the first place, that though the mortgage speaks of "all of the property owned" by the mortgagor, this general language is later limited by the words "consisting of machinery, tools, equipment, supplies, office furniture, fittings and safe," so that the rule applies that words of general import are limited by accompanying words of limitations.

Furthermore, though the minutes of the corporation show that authority was given to mortgage everything, the parties omitted the stock of goods and manufactured pumps then on hand, or to be made thereafter. In truth there is noth-

ing mentioned in the mortgage analogous to a stock of goods, except perhaps the word "supplies." What that word means it is difficult to say.

If it be granted that the word refers to the raw materials from which the company made its pumps, what is the court going to do? Is it going to say to Mr. Peterson: "You, Mr. Peterson, have been guilty of a fraud, you have acted in a villainous manner, you have tried to injure the creditors of this company by giving the corporation money with which to pay them all off, and as a penalty and punishment for this grievous wrong this court will declare that your fraud has so permeated and tainted the whole transaction that it must in justice to the creditors hold the mortgage void, not merely as to the supplies, but also as to the machinery, tools, equipment, office furniture, fittings and safe."

In conclusion, we ask, is it not more consonant with reason, with justice, with the precedents, with wholesome business common sense for this court to say as a matter of law:

(1) That the supreme court of Oregon has not decided whether or not a chattel mortgage is void in toto simply because of constructive fraud as to a part thereof.

(2) That in the absence of an authoritative decision to that effect clearly binding this Court, it is declared to be the law that a mortgage may

be void in part for constructive fraud and valid as to the residue; and

(3) That a chattel mortgage covering a stock of goods and fixtures, given and received in good faith, with power of sale as to the stock of goods reserved in the grantor, together with the right to the proceeds, is, as to creditors of the mortgagor, void as to the stock of goods and valid as to the fixtures.

It is believed that such is the present status of the law in the state of Oregon.

Respectfully submitted,

WOOD, MONTAGUE & HUNT,
Attorneys for J. H. Peterson.

C. E. S. WOOD,
P.P. DABNEY,
M. M. MATTHIESSEN,
of Counsel.

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In the United States Circuit Court of Appeals

For the Ninth Circuit

J. H. PETERSON,
Petitioner and Appellant,

vs.

R. L. SABIN, as Trustee of the Estate of Rohrbacher Automatic Air Pump Company, a Corporation, Bankrupt,
Respondent and Appellee.

In the Matter of Rohrbacher Automatic Air Pump Company, a Corporation, Bankrupt.

BRIEF OF RESPONDENT AND APPELLEE.

CORRECTION OF APPELLANTS' STATEMENT OF THE CASE.

Before entering into a discussion of the legal phases of the question involved in this litigation, it is believed to be wise to correct a few erroneous statements contained in the statement of facts set forth in various parts of appellant's brief.

It is stated, on pages 1 and 2 of said brief, that the funds for which the mortgage was given as security, were advanced to the bankrupt by the appellant, J. H. Peterson, with the understanding that the sum advanced would pay off all the debts of the bankrupt company.

No such facts are contained in the stipulation, which constitutes the entire evidence in this case, nor did it so appear in the evidence on which the stipulation was based.

On page 7 of appellant's brief, it is stated that at the time the loan was given, J. H. Peterson, the appellant, had no occasion to surmise that the company was insolvent, and that in fact the company was not then insolvent.

Neither of these facts is contained in the stipulation. The statement as to surmise may be true, although it did not so appear in the evidence, and therefore cannot be taken as the fact, but the statement that the company was not insolvent at the time the loan was made is neither true in fact nor does it so appear in evidence.

And it is stated on page 30 of appellant's brief that though the minutes of the corporation show authority was given to mortgage all the assets of the corporation, the parties omitted from the mortgage the stock of goods and manufactured pumps then on hand or to be made thereafter.

Neither the evidence nor the mortgage shows that the parties omitted anything therefrom, in fact, the mortgage states specifically that it covers "all the property owned by the party of the first part" (Transcript, page 17), and the stipulation, paragraphs V and VI (Transcript, page 15), not only negatives the fact that anything was omitted from the mortgage, but clearly shows that the entire floating stock of supplies and pumps were included in the mortgage.

With the above exceptions, the facts as stated in the appellant's brief are correct, and while these erroneous statements, even though they were true, cannot in any way affect or alter the situation, yet it is believed to be better that the exact facts be properly before the court.

SOLE QUESTION TO BE DECIDED.

Counsel for appellant have fairly stated in their brief the sole point to be determined by this Court, but for purposes of accuracy the question may be slightly differently restated here.

Where a chattel mortgage is given covering a shifting stock of goods, and likewise property not shifting, but of a stationary character, and the possession of the entire property is allowed by the terms of the mortgage to remain in the possession of the mortgagor, the mortgagor being given at the time the mortgage was executed unlimited power of disposition and sale of the shifting stock of goods, without accounting to the mortgagee, is such a mortgage, admittedly fraudulent under the laws of the State of Oregon, void not only as to the shifting stock of goods, but likewise void as to the property not shifting?

ARGUMENT AND AUTHORITIES.

Counsel for respondent is in accord with counsel for appellant in the statement that no case has arisen in Oregon where the facts affirmatively show that the mortgage is given upon a shifting stock of goods, and likewise upon property not shifting, possession of all of said property being permitted to remain with the mortgagor, who, at the time the mortgage is given, it is agreed may have unlimited power of disposition and sale of the shifting stock of goods without accounting to the mortgagee, in which, under such a state of facts it is held specifically, and in so many words by the Court, that the mortgage is void both as to the shifting stock and as to the stationary property, where there appeared in said case no element of actual positive fraud, involving an active and purposeful design on the part of the parties to defraud the creditors.

While admitting this limitation as to the nature and extent of the Oregon cases, we do, however, earnestly insist that no other interpretation can be placed upon the language used by the Oregon court in the decision of the various cases which have come before it, than that a mortgage void because of fraudulent reservation as to a portion of the property, is also invalid as to other portions of the property not thus fraudulently reserved.

OREGON DOCTRINE.

A discussion of the Oregon cases on this subject is advisable so that the status of the doctrine adopted in Oregon as to mortgages on merchandise, with power of sale in the mortgagor, may be clearly determined, inasmuch as the Federal Courts will look primarily for guidance to the decisions in this particular state.

In the case of *Orton vs. Orton,* 7 Ore. 498, it is held that when it appears either on the face of a chattel mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor unlimited power to dispose of the property mortgaged, for the use of the mortgagor, the *mortgage* is void as to purchasers and attaching creditors.

In the case of *Jacobs Bros. & Co. vs. Irvin,* 9 Ore. 52, the Court holds that where, upon the execution of a chattel mortgage on a portion of a stock of goods in the store of a retail merchant, there is a verbal agree-

ment between the parties that the mortgaged goods shall remain in the mortgagor's possession and form part of his stock in trade, and that he shall have full power to sell and dispose of the same in the usual course of his business, such *mortgage* is fraudulent and therefore void as to the creditors of the mortgagor.

In *Bremer & Co. vs. Fleckenstein & Mayer,* 9 Ore. 266, which is the leading and authoritative case principally cited for the doctrine in Oregon, it was held that a chattel mortgage is void where there is an agreement between the parties, allowing the mortgagor to continue in possession of the mortgaged chattels with power to sell and dispose of portions of the same for his own benefit in the usual course of trade, for the reason that, *irrespective of the actual intent with which the mortgage was entered into,* the *effect thereof* is so pernicious as to stamp it as fraudulent, and the parties must be presumed to have so intended. Says the Court, on page 273 of the opinion:

> "We regard it as settled doctrine here that an agreement of that character (as above outlined) between the mortgagor and the mortgagee at the time the mortgage is given, renders the *mortgage* (italics ours) fraudulent and void as to other creditors of the mortgagor . . . Here,then, we find Haas (the mortgagor), after the execution of the mortgage to appellants, carrying on his business in the same manner as before, selling off the mortgaged stock in trade, and

> paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its obvious effect was to ward off its other creditors, and hinder and delay the collection of their demands against him, and the appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld."

The case of *Aiken vs. Pascall,* 19 Ore. 493, follows the previous case, in holding that when it appears either on the face of a chattel mortgage or by parole evidence that the mortgage of personal property has given to the mortgagor power to dispose of the property mortgaged, and to apply the proceeds to his own use, the *mortgage* is void, since the fact that the mortgagor was permitted to treat the goods as his own, and to sell and appropriate the proceeds stamps it as fraudulent.

In *Fisher vs. Kelly,* 13 Ore. 1, 14, it is said:

> "When it appears from extrinsic evidence that the mortgagor is to remain in possession of the goods mortgaged, and sell the same in the usual course of business, *the mortgage is fraudulent in fact* (italics ours) for the reason that it is for the mortgagor's own use and benefit, and

> comes within the inhibition of Section 3053, Hill's Code, which declares all transfers of goods and chattels made in trust, for the person making the same shall be void as against the creditors existing, or subsequent, of such person," and citing the cases above mentioned.

In *Sabin vs. Wilkins,* 31 Ore. 450, 456,—L. R. A. 465, opinion by Judge Wolverton (then Associate Justice of the Supreme Court of Oregon), from whose decision the present case is appealed, it is said:

> "It has been decided in this state that when it appears, either upon the face of the mortgage or by parole evidence aliunde, that the mortgagee of personal property has given the mortgagor unlimited power and authority to dispose of the property in the usual course of trade for his own use and benefit, the *mortgage* (italics ours) is void as to attaching creditors."

And the Court, further discussing the matter, says, in substance, that whether the objectionable agreement appears in the mortgage or whether made by independent agreement, expressed or implied, either at the time the mortgage was entered into or subsequent thereto, the mortgage is thereby converted into an instrument for the benefit of the mortgagor, and is fraudulent and void from the time such purpose is promoted.

In *Gregg vs. Mueller* (Oregon), 133 Pac. 94, the latest (1913) case decided upon the question in Oregon, the doctrine of the cases above outlined, is followed and approved. In this case a mortgage was given upon a shifting stock of goods as well as upon other property not shifting, and the mortgagor was permitted to remain in possession of the property, and to sell the shifting stock without accounting for the proceeds, although the mortgage required him thus to account, and the court held that the mortgage was fraudulent and void as to both the stock and fixtures. It is true in this case that the element of actual fraud on the part of the mortgagor was present, but it is maintained that the court propounds the following principle of law as applied to chattel mortgages of this character in Oregon:

That a mortgage on a stock and fixtures, where possession of the property remains in the mortgagor, with power of disposition in the mortgagor to dispose of the stock in the usual course of trade, is void; that is, the *mortgage* is void, but if the mortgage contains a provision for an accounting to the mortgagee with application of the moneys in payment of the debt secured, the mortgage is then valid, *provided* such provision for an accounting is made in good faith, and no laches occurs on the part of the mortgagee. If, however, the provision for accounting is not in good faith, or there be laches on the part of the mortgagee, then the mortgage is void in spite of its valid form.

As has been stated, the court held in this case that

though the mortgage on its face was a valid mortgage, and provided for an accounting, yet the mortgagee, by reason of his laches, permitted the mortgagor to neglect to account for the proceeds, and thereby converted the mortgage into a mortgage for the benefit of the mortgagor, which raised the indisputable presumption of fraud.

Now, it is contended that none of the Oregon cases, from *Orton vs. Orton,* to *Gregg vs. Mueller,* makes any distinction as to the property conveyed, but all of them hold that the *mortgage* is void. And this is particularly true in the latest case of *Gregg vs. Mueller,* where both shifting stock and stationary property were involved, yet no distinction was made in the entire opinion as to the nature of the *property* involved, the whole discussion being as to the *mortgage* itself, as to whether the *mortgage* was valid, or the *mortgage* void.

We, therefore, take issue with the statement of counsel for appellant that the Oregon court has not decided that a mortgage void in part is void in toto, and that the question in the case at bar is an open one in Oregon.

The Oregon court has never decided that a mortgage upon the circumstances here set forth could be void in part only. The language of every opinion in all cases coming before the Oregon court on this subject, treats the mortgage as an entity, and not so susceptible of division into parts, and while it is admitted that there is no language in the Oregon cases stating specifically and explicitly that a mortgage void in part is wholly

void, in cases of this particular character, yet there has been no occasion for such a statement, and the language used in the cases which did arise and which have been referred to, is such that no other interpretation can be placed upon it than that herein urged.

However, conceding, for the purpose of argument, that the Oregon court has not decided this question, and that the question is an open one in this state, we will proceed to examine the authorities in other states, and insofar as can be ascertained, the basis for the respective decisions on the general subject.

DOCTRINE IN OTHER STATES.

It may be premised that the courts of the various states which have passed upon the question now at issue, are not harmonious, some holding that though the mortgage be void, as to the shifting stock, because of a provision allowing the mortgagor to retain possession of the shifting stock of goods with absolute power of disposition and sale without accounting, yet as to other property contained in the mortgage not of a shifting character, concerning which no power of sale is given, it may be valid. The states holding the doctrine "void in part not necessarily void in toto" are: Alabama, Illinois, Indiana, Montana, Wisconsin, and possibly Texas.

The states holding the reverse of the proposition, namely, that a mortgage void in part is void in toto,

disregarding Oregon for the present, are: Colorado, Kansas, Minnesota, Mississippi, Missouri, New Jersey, New York, South Dakota, Tennessee and West Virginia.

BASIC PRINCIPLE UNDERLYING THE CASES.

Attention is directed first to the states apparently sustaining appellant's contention, and here it should be first particularly noted that in these states the doctrine does *not* prevail, as in Oregon, that a mortgage upon a shifting stock of goods *only,* where the possession is permitted to remain in the mortgagor, who is given unlimited power of sale either under the terms of the mortgage or by collateral agreement, expressed or implied, is *fraudulent per se* and as a matter of law, but rather that the intention is to be determined as a matter of fact. (This statement should be qualified as to Alabama, in which state the doctrine has been modified subsequently, however, to the time of the decision of Hayes vs. Westcott, quoted in Appellant's brief. At the time of said decision the cases required that the intention be shown as a matter of *fact.*)

This distinction is believed to be of importance and stress is particularly laid thereupon. It will be observed here that the question of void in part, void in toto, or not, is not in anywise involved, excepting as the conclusion of the particular court is affected by the radical

difference in the governing principle. In the discussion of this question by the courts the lien is co-extensive with the power of sale. It is not questioned by Appellant that the Oregon decisions unanimously and strongly insist that where all the stock is shifting and the mortgagor is left in control the mortgage is *void,* not *prima facie,* void, but *absolutely* void, whereas, we will show that the courts of the states cited as favorable to Appellant do not invoke or apply this well-established principle of the law of mortgages in Oregon.

ALABAMA

At the time of the decision of Hayes vs. Westcott, 91 Ala. 143, 8 Sou. 347, the Alabama courts held that such a mortgage was not void in the absence of an *affirmative intent* in the mortgagor to hinder, delay and defraud his creditors.

Thornton vs. Cook, 97 Ala. 630, 632.
Howell vs. Carden, 99 Ala. 101, 111.
Goetter vs. Norman, 107 Ala. 585, 595.
Troy Fertilizer Co. vs. Norman, 107 Ala. 667, 681.

ARKANSAS

The courts of Arkansas also hold it to be necessary to show an actual fraudulent intent, even though all the property pledged be shifting, and the posession thereof is left in the mortgagor with unlimited power

of sale without an accounting. Jones on Chattel Mortgages, 5th Edition, paragraph 383-a, states as follows the result of the Arkansas decisions in this regard:

> "The mortgagor's possession of the mortgaged merchandise, with power of disposition seems, however, to be not conclusive of fraud, but only evidence of it. These circumstances render the mortgage void if they are not explained. The question of fraud is still one of fact for the jury, and not a conclusion of law."

Morton vs. Ogden, 41 Ark. 186.

Fink vs. Ehrman, 44 Ark. 310.

Gauss vs. Doyle, 46 Ark. 122.

ILLINOIS.

And so in Illinois, in the case of Goodhart vs. Johnson, 88 Ill. 61, cited by appellant, it is said:

> "As to the question of fact, the intention of the parties in the making of the mortgage, whether honestly and in good faith, to secure the payment of an indebtedness . . . or to hinder or delay creditors, that was for the court below, upon which all the evidence we have considered would be ~~burdened~~ pertinent, and the finding of the court thereon we do not see sufficient reason to disturb."

See also to the same effect Barnett vs. Fergus, 51 Ill. 352, cited by appellant.

INDIANA.

And likewise in Indiana, in Lockwood vs. Harding, 79 Ind. 129, 133, also cited by Appellant, it is stated that the question of fraudulent intent is made by statute in Indiana in all cases a question of fact.

> "The case will be rare, indeed, in which it can be said as a matter of law that a chattel mortgage is void upon its face."

WISCONSIN.

And in Wisconsin, in the case of Eastman vs. Parkinson, 133 N. W. 649, it is stated that no intent to defraud can be inferred. Says the Court:

> "It may well be that the mortgagor was allowed to remain in possesion of the mortgaged property, and to use some of the stock in trade, as it had theretofore used the same until claimed by the mortgagee; and there not having been any specific agreement to that effect, or, in case of an agreement, an intent to defraud, such conduct, unexplained, is evidence of fraud, but not necessarily conclusive of it."

TEXAS.

And in Texas, the court likewise holds that such a provision in the mortgage does not make it fraudulent in law.

Jones on Chattel Mortgages, Sec. 407.

MONTANA.

It is difficult to arrive at a correct understanding of the decisions in Montana, but it is not necessary for our purposes, since in Montana (and likewise also, for that matter, in Wisconsin), a statute hereafter to be referred to in discussing the decision in that state, qualifies the situation.

DOCTRINE OF OREGON AND OTHER STATES.

In most of the other states with which we are concerned, however, in accord with the doctrine enunciated by the Supreme Court of Oregon, a chattel mortgage is pronounced *conclusively fraudulent in law,* irrespective of actual intent, where the mortgagor is allowed to retain possession of the property mortgaged, with unlimited power of disposition and sale thereof without accounting.

Bremer vs. Fleckenstein & Mayer, 9 Ore. 266.

Wilson vs. Voight (Colo.), 13 Pac. 726.

Bank of Rome (Tenn.) vs. Haselton, 15 Lea. 216.

Gallagher vs. Rosenfeld, 47 Minn. 504.

Cook vs. Bennett, 60 Hunn. N. Y. 8.

Hangen vs. Hachemister, 114 N. Y. 266, 21 N. E. 1046.

Greeley vs. Winsor, 1 S. Dak. 518, 48 N. W. 214, 45 N. W. 325.

Garden vs. Bodwing, 9 W. Va. 121.

One of the best discussions of this doctrine and the reason therefor, is, perhaps, presented in the case of Bank of Rome vs. Haselton (Tenn.) 15 Lea. 216. There the Court says:

> "In Bank vs. Ebbert, 9 Heis. 153, the mortgage contained an express reservation that the debtor, without bond, should keep possession of the stock of merchandise (Liquors), and carry on the business, selling and buying just as before the deed, and the trustee should take possession only on default of payment of the note first due. For this reason the deed was declared void, because, 'although there was no specific intent to defraud any particular creditor, or no actual fraud in fact, yet there are such *facilities for fraud* contracted for on the face of the deed that it must be held wanting in legal good faith . . . There is a benefit contracted for to the grantors on the face of the deed, and a prejudice to the rights of other creditors, in being able to keep their stock in trade covered up from execution, or attaching creditors, while they continued to use the same in defiance of their demands for profit, and with the means of appropriating the proceeds to their own use.'
>
> "This case is disputed as a precedent for the present case, since no benefit or facility for fraud is *contracted for on the*

face of this deed, there being no special stipulation in it that the debtor shall remain in possession and carry on the business of merchandising until the default. This distinction is obvious. Does it affect the result?

"In the *Ebbert* case, the court, following *Twynne's* case, wherein the sale was held void, because the debtor 'continued in possession of the goods and used them as his own; and some of them he sold; and he shore the sheep and marked them with his own mark,' adhered to the old doctrine of liberal exposition and application of statutes 'to prevent fraud, which doth so much abound in these days,' and announced as the basis of decision in that case, 'that any conveyance that puts the property of the debtor in the name of a third party, so far as the legal title goes, and leaves it in his possession, and under his control, with the right to continue to use it in trade, sell and dispose of it as before the conveyance, lacks the essential elements to sustain such a conveyance as against a creditor.'

"And in the well considered case of Phelps vs. Murray, 2 Tenn. Ch. Rep. 746, in which the leading cases were reviewed and analyzed, Judge Cooper held that the conveyance, which was 'of our entire stock of goods . . . now in our store . . . and any other goods which may, during the existence of this mortgage, be purchased by the grantors and put into the store,' being of that class where 'a mortgage lien is sought to be created on personal goods, the only profitable use of which is as articles of com-

merce, and an unlimited power of disposition is reserved, was invalid at law and not enforceable in equity,' upon the ground that such a transaction, irrespective of fraud, is *against public policy,* throwing open too wide a door for possible fraud.'

"* * * In the present case it is obvious that it was intended by Montague and Manager Stone, that the debtors should so use the goods; though the power of sale is not expressly contracted for, it is plainly implied; and the deed was so construed and acted upon by the parties, and was thus as efficient for advantage to the debtor and injury to the other creditors, as though the right had been expressly contracted for.

"Though the parties may have been honest in their intentions, it is obvious that at the time of making this mortgage, it was understood between the parties to it that the mortgagor should retain possession of the goods and keep open the store and retail the same after the mortgage just as before. *It is this intention to allow the mortgagor the right of disposition,* whether that intention appear on the face of the deed, or by express oral declaration of the mortgage, or is inferred from the relation and conduct of the parties, which, in the opinion of the majority of the Court (Judges Freeman and Cooper dissenting), *stamps the mortgage as void;* Pierce on Mortgages of Merchandise, Ch. III. And being void as to the merchandise, it is settled by our decisions to be void as to all the property embraced in the mortgage. Simpson vs. Mitchell, 8 Yer.

419; Richmond vs. Crudup, Meigs, 581; Trabue vs. Willis, Id. 584." (Italics ours.)

It will, therefore, be seen that the mortgage is pronounced fraudulent and void, not because of any guilty intent or any malicious design on the part of the mortgagee, but because of the harmful effect of such a provision upon creditors, and because it is bad public policy to encourage such mortgages. In other words, the mortgage in these states is declared void, *not* for the purpose of *punishing* the mortgagee, but for the purpose of *protecting* creditors and upholding the policy of the law.

In the other states which do not hold that a mortgage is fraudulent per se because of such provisions as those under discussion, the erroneous impression seems to prevail in the decisions that the basis for declaring such a mortgage void is punishment of the mortgagee, the result being that when a mortgage is given upon stock shifting, and stationary property, with power of disposition in the mortgagor without accounting, these decisions seem to conclude that the purpose of punishment is sufficiently accomplished by holding that the mortgage is void as to the stock concerning which there is a provision for sale, and that there is no need for extending the punishment upon that portion of the property which is not allowed to be disposed of by the mortgagor during the existence of the mortgage.

It will thus be seen that much of the criticism con-

tained in the citations in appellant's brief is based upon reasoning from false premises, and the value of the criticism as well as of the conclusions expressed in these citations is not apparent. The basic principle, to which we have endeavored to call attention, is in these citations entirely overlooked or mistated.

DOCTRINE OF VOID IN PART, VALID IN PART.

Now, proceeding to a discussion of the cases holding that a mortgage of the character under discussion void in part may be valid in part, it will be seen that none of the cases adopt the doctrine of *"fraud per se,"* but merely hold that such a provision is a "badge of fraud," and that *actual* intent to defraud the creditors must be shown. True, such provision is held by some of these cases to be evidence of fraud, but the provision of itself does not preclude evidence of good intent, nor will it justify the court in holding as a matter of law that there is fraud. Nor, unlike Oregon, do any of these cases hold that it is against public policy to permit such a provision, in fact, some of them, unlike Oregon, expressly state that the provision in itself is not against public policy, hence in most of these cases the theory is indulged in that the mortgage itself, when executed, is a valid mortgage, and that the permission to allow the mortgagor to continue in the use of the property with unlimited power of sale without an accounting is a waiver of the lien by the mortgagee upon

the property upon which the power of sale is permitted, if the provision amounts to fraud. In other words, the lien of the mortgage is withdrawn from so much of the property as is within the power of sale. If it be given as to all the property included in the mortgage, then these courts hold, fraud being found, that the lien of the entire mortgage is waived and that the entire mortgage is therefore void, and that if the property upon which the power of sale is given is only a part of the mortgaged property, then the lien is waived as to so much of the property upon which the power of sale is given, and as to that property the mortgage is void, but as to the balance of the property upon which the power of sale is not given, the lien is not waived and the mortgage as to such property is valid.

Now, discussing the individual cases cited by appellant from the various states, with reference to the void in part, valid in part, holding:

ALABAMA.

Hayes vs. Westcott, 91 Ala. 143; 11 L. R. A. 488, 490.

All of the elements suggested above are present in this case:

Firstly, the decision is permeated with the idea that the reason of the doctrine of the orthodox decisions, that a transaction of the character under discussion is fraudulent and void in toto is to punish the mortgagee.

Secondly, it holds, unlike Oregon, by its reasoning that such a conveyance is *not* against public policy.

Thirdly, the theory upon which the decision is based is that the mortgage when given was *valid,* and that the invalidity thereof applies only to such property concerning which the mortgagor is given the power of sale; in other words, it assumes that the *mortgage* is valid in its inception; that the *intent at its making* does not vitiate the mortgage, but that the *dealing* with the property under the mortgage by the parties thereto invalidates the mortgage after it is made as to such property concerning which the fraudulent intent is found.

The case has been quoted at such length in the brief of appellant that the language of the court need not here be set forth. Reference is made to the brief of appellant, pages 18-20, and pages 28-29, for extracts from the decision, which extracts we think sufficiently illustrate the misapprehension as to which we have adverted.

ARKANSAS.

Lund vs. Fletcher, 39 Ark. 325, 335.

In this case there is no discussion of the principle involved, the court merely saying that the mortgage was good as to the articles included therein not intended for sale.

In re: *Reynolds* (Ark.) 153 Fed. 295, 297.

Here, the Federal Court, without discussion of the principles, states that the case of Lund vs. Fletcher, being a decision of a court of last resort in the state in which the mortgage was given, it would be required to follow said decision, but the case decides that the mortgage is void in toto under section 60 of the Bankruptcy Act. The question, therefore, as to the validity of the mortgage in part not being before the court, was not decided.

ILLINOIS.

Barnett vs. Fergus, 51 Ill. 352.

It is apparent that the Illinois court also labors under the same mistaken view of the principle involved as that which vitiates the reasoning of the Alabama court in Hayes vs. Westcott. Particularly is this so as to the theory concerning the validity of the mortgage at its inception, and the waiver of the lien by permitting the mortgagor to continue in the possession of the property with unlimited power of sale. In that opinion, the court, after using the language cited on pages 21 and 22 of appellant's brief, continues:

> "The utmost that could be said to his (the mortgagee's) injury, would be that where the bona fides of the mortgage comes in question, the fact that he has permitted the mortgagor to use the goods in a manner inconsistent with his own rights as a mortgagee, is a circumstance which a jury would have a right to consider in determining the question whether the mortgage was originally made to defraud

creditors, and is therefore equally void as to both goods and horses. The degree of weight to be given to this circumstance would, of course, greatly depend upon the other evidence in each case. Taken by itself and with no circumstances to throw discredit upon the mortgage, it would merely show that the mortgagee had consented to release the goods from the lien of his mortgage, thereby impairing his own security to that extent, but would by no means justify the inference that he intended to abandon his lien upon the horses.

Applying these principles to the case at bar, we do not find it difficult of decision. The mortgage covered the printing press and its appurtenances, and certain books and blanks which had been printed by the mortgagor, and which were held by him for sale. The evidence shows he continued, with the knowledge of the mortgagee, to sell these books and blanks in the same way after as before the mortgage was made. As to these the other creditors had a right to insist the lien of the mortgage, as against themselves, was lost. But not so as to the printing press and its appurtenances. The mortgagee had consented to nothing, in regard to that portion of the property inconsistent with his position and rights as mortgagee. He had a right to *relinquish* his lien upon the books without losing that upon the press, and such relinquishment is, of itself, but very slight evidence of a fraudulent intent in making the mortgage." (Italics ours.)

INDIANA.

Davenport vs. Foulke, 68 Ind. 382.

The decision in this case was based on the grounds that the mortgagee had waived his lien as to all the property; however, the court approves (*obiter dicta*) the decision in the case of Barnett vs. Fergus, 51 Ill. 352. (See brief of appellant, page 21). Since that Illinois case has been discussed nothing need be repeated here concerning the same.

Lockwood vs. Harding, 79 Ind. 129, 133.

In this case, also cited by appellant, while the question did not arise, the decision being upon demurrer to a complaint and the demurrer being sustained, and the whole mortgage held valid, yet the court here indulges in *dicta* also, and states the doctrine that a mortgage of the kind under discussion may be void in part, yet valid in part.

In re: *Soudan Mfg. Co.,* (Ind.) 113 Fed. 804, 809.

This case, arising under the laws of the state of Indiana, the Federal Court, in deciding the question as to whether a mortgage of the character under discussion may be void in part and valid in part, holds that the Indiana law as interpreted by the courts permits a mortgage to be held valid in part although void in part.

Rochelear vs. Boyle, 11 Mont. 451; 28 Pac. 872.

The same theory pervades in this case. The decision, however, is not without some complication of language. It seems that the mortgagor was allowed to remain in the possession of the property with unlimited power of sale as to the stock and the fixtures, but the possession of the stationary property (if the court considered it in the possession of the mortgagor at all), was under the eye and supervision of the mortgagee. It also appears that the Supreme Court of Montana had formerly held in the case of Leopold vs. Silverman, 7 Mont. 262, that a mortgage upon a shifting stock of merchandise, where possession was allowed to remain with the mortgagor who was given unlimited power of sale, was void in law. In the present case, however, the court evidently regrets its former decision, and in fact practically overrules it, stating inferentially that such a provision in itself, unless there is evidence of bad faith or active evidence of an intention not to apply the proceeds to the mortgage indebtedness, is *not* void.

At any rate, the decision in this case is based upon a *statute* in Montana which provides that no mortgage of goods shall be valid except as to the parties, unless the possession of such chattels be retained by the mortgagee, or the mortgage itself provides that the mortgagor may remain in possession and be accompanied by an affidavit that the same is made in good faith without design to hinder or delay the creditors, which mort-

gage and affidavit are required to be recorded. The court then holds that this requirement of the statute in this case was not complied with as to the stock of goods, and that therefore the mortgage is ineffective as to said stock of goods, but specifically avoids holding that the mortgage for that reason is impliedly fraudulent even in part, saying:

> "But after due consideration, we do not regard the case as involving the question of fraudulent intent to be found by applying the principles of constructive fraud or fraud in law, so much as the question whether or not the parties by the conditions which they entered into or sanctioned by their conduct made, or failed to make, a valid mortgage as to the whole or part of the property intended to be covered by the mortgage lien, or having made a good mortgage so far as shown by the terms of the instrument,by mutual agreement, understanding or permission, the parties annulled such essential condition of the mortgage as to the whole or part of the property mentioned."

And further, that:

> "It may be found without reference to the question of fraud, that the parties fell short of making a mortgage, or having made one that they nullified it as to the whole or part of the property by other agreement, understanding, or permission touching the same."

The court then holds that as to the property of a

stationary character on which there was no power of sale, and upon which it must be assumed that the mortgagee had control, the lien of said mortgage was effective.

TEXAS.

Cook vs. Halsell, 65 Tex. 1, 6.

In the above case no discussion is had concerning the question, but a mere short statement appears that the mortgage is valid as to the stationary property.

WISCONSIN.

Eastman vs. Parkinson, 113 N. W. 640, 13 L. R. A. (N. S.) 921.

The Wisconsin court in this case furnishes a good illustration of the attitude of the courts holding the view that a mortgage such as under discussion may be valid in part, though void in part. That the court assumes that one of the reasons for the courts of other states holding the mortgage void in toto where void in part is one of punishment, may be seen from the following language used by the court:

> "Why should one, in such a matter, who is not guilty of any moral turpitude, or of violating any written law creating a forfeiture, be punished in excess of the utmost possible injury that could occur to others from the technical wrong.

> "We are unable to see any wrong in such a transaction; one where there is an entire absence of any actual intent to commit a wrong, that should, by force of mere judicial policy, be so severely punished as by taking from the mortgagee, not only the propery he did not intend to absolutely hold as security, but the other property also."

Likewise, the court does not approve (in the absence of actual intent to defraud), of the Oregon theory that it is against public policy to hold a mortgage void where the possession of property with unlimited power of disposition is left with the mortgagor without accounting.

It may be concluded, therefore, that in all the states which have held that such a mortgage may be valid as to stationary stock over which there is no power of sale, yet void as to shifting property over which there is a power of sale in the mortgagor, the reason, where any reason is assigned, is based upon the doctrine that an agreement permitting the mortgagor to retain possession of chattels with unlimited power of sale without an accounting, is not necessarily against public policy, nor void per se, and these courts are becoming more and more insistent upon the requirement that an intent to defraud creditors be actually shown in such cases. True, they assume that certain conditions make a prima facie case, yet they allow evidence of good faith to be shown and some of them, by statute, are satisfied

with the requiring of an affidavit to the fact that the mortgage is executed in good faith. And there is but a slight step from this position to the holding that where prima facie fraud only is established as to the property which the mortgagor is permitted to sell, that the mortgage is valid as to property upon which there is no such power of sale.

And these courts, thus holding, criticise, as we have pointed out, upon a false premise, the other courts which hold differently. They assume that the courts which, like Oregon, hold that the mortgage is void in toto, base their reasoning upon the idea of a *punishment* to the mortgagee for having permitted a fraudulent act.

That appellant, likewise so misapprehends the doctrine of the Oregon and other courts holding similarly, and shares in the non-existent "punishment" theory ascribed to the Oregon doctrine, by the Alabama, Illinois, and other cases cited by him, is well illustrated by the "poser" which apellant propounds to this court in his brief (page 31):

> "Is it (referring to the Circuit Court of Appeals) going to say to Mr. Peterson: 'You, Mr. Peterson, have been guilty of a fraud, you have acted in a villainous manner, you have tried to injure the creditors of this company by giving the corporation money with which to pay them all off, and as a penalty and punishment for this grievous wrong this court will declare that your fraud has so

> permeated and tainted the whole transaction that it must in justice to the creditors hold the mortgage void, not merely as to the supplies, but also as to the machinery, tools, equipment, office furniture, fittings and safe."

Of course, this assumption is not a correct one. The reason that the mortgage is held void in toto in Oregon and other states is because, for reasons of public policy, it is presumed conclusively that such mortgage was made with the intention to defraud the creditors, and the mortgage having been fraudulently entered into is void because of the intent with which it was entered into; in other words, these courts hold that the mortgage is void ab initio, and the idea that a *mortgage* thus *void,* may be valid in any particular is incongruous.

Now, taking up a discussion of the courts holding the doctrine which may, for the purpose of convenience, be denominated the doctrine of

VOID IN PART, VOID IN TOTO: COLORADO.

Wilson vs. Voight (Col.) 13 Pac. 726
Brasher vs. Christophe (Col.) 15 Pac. 403, 409
Harbinson vs. Tufs (Col.) 27 Pac. 1014, 1015
Roberts vs. Johnson (Col.) 39 Pac. 596, 599.
Dodge vs. Norlin (Col.) 113 Fed. 363, 370

Says the Colorado court in Wilson vs. Voight, *supra*:

> "The fact that other property besides merchandise was included in the mortgage, does not affect the result. There are cases which hold that such an instrument may be void in part and in part valid, but we are inclined to accept and apply the doctrine, elsewhere announced, that if the mortgage be void as to a portion of the property mentioned therein, it is void altogether. It is the *agreement to sell,* retaining the proceeds, or the *act of selling* with the mortgagee's consent, and retention of the proceeds, that invalidates the transaction. Whether this agreement or this act relates to one part of the property mortgaged or another is a matter of little significance. In a case like the one at bar, where there is no express agreement, why should the mortgage be held good as to the fixtures but void as to the goods remaining unsold? It may be that had things remained in *statu quo* and Voight returned, he would have proceeded to sell the fixtures. If, under a contract providing for the sale of merchandise, the mortgage may remain valid as to fixtures and other property, it should follow that when the contract related to a particular line of goods, or a particular part of the stock, the mortgage would remain unassailable as to the rest of the wares and commodities . . . There will, in our judgment, be less confusion, and in the end less real injustice, by adhering to the rule that if the mortgage is, upon this ground, void in part, it is wholly void."

And in the case of *Brasher vs. Christophe, supra,* the court, after quoting the language of Wilson vs. Voight,

as set forth above, makes the following additional comment:

> "The agreement to sell invalidates the mortgage as to creditors and incumbrancers, and this effect takes place at the moment of delivery of the instrument. It is not necessary to this effect that any of the property be sold under the power. The transaction is vitiated *ab initio,* as to all the property upon which it is attempted to create a lien, by the reservation of such right, and not by the exercise of it."

MINNESOTA.

Horton vs. Williams, 21 Minn. 187.

Gallagher vs. Rosenfield, 47 Minn. 507, 511; 50 N. W. 696.

Says the court in the last mentioned case, at page 511:

> "It is insisted by the defendant that since by the terms of the mortgage the mortgagor is only authorized to sell the stock in trade, the mortgage, thought void as to the liquors and cigars, is valid as respects the fixtures and other property to which the license to sell did not extend, The better opinion supported by Horton vs. Williams, 21 Minn. 187, is that the entire instrument is vitiated by the *fraudulent provision,* as to a part of the goods. Russell vs. Winne, 37 N. Y. 591. Holt vs. Kremer, 34 N. J. Eq. 181. Mead vs. Combs, 19 N. J. Eq. 112. Wallach vs. Wylie, 28 Kan. 97. The unlawful design

permeates the mortgage . . . The transaction must be considered as a whole . . . This is the only sound and safe rule. Wait on Fraudulent Conveyances (2d Ed.) Paragraph 434. Bump (?) on Fraud. Conv. (3d Ed.) page 487."

MISSISSIPPI.

Burk vs. Murphy, 27 Miss. 167, 187-188.

Harmon vs. Hoskins, 56 Miss. 142, 149.

Andrews vs. Partee, 79 Miss. 80, 84; 29 Sou. 788.

The doctrine in Mississippi may be illustrated by a quotation from the latter case. Says the court:

"Notwithstanding the good faith and honest purpose of both the men, in fact, still the law denounces a trust deed hampered by such an agreement or understanding (permitting the mortgagor to retain possession of the property and to sell a part thereof) as fraudulent and void as to creditors. The rule is a hard one, but it is too well settled by authority for us to disturb it. The understanding between Mr. Dre and Mr. Moore is the 'fly in the ointment' which vitiates the instrument, not only as to the logs, but also as to everything else conveyed by it, so far as creditors of the grantor are concerned, and this is thoroughly well settled by authority."

MISSOURI.

Independent Packing Co. vs. Barth (Mo.) 106 S. W. 1121-1123.

Apparently the Missouri court will not now follow the doctrine of Bullien vs. Barrett, 87 Mo. 185, and In re: Kirkbride (Mo.) 5 Dillon, 116, 118, cited in appellant's brief, since the recent case of Independent Packing Co. vs. Barth. Here the court has held that the mortgage is void on its face as to both the floating and stationary property, because it provided that the possession of the property should remain with the mortgagor, and it also appeared aliunde that the mortgagor was given power to dispose of and sell "the liquors described in the mortgage."

NEW YORK.

Russell vs. Winne, 37 N. Y. 501; 97 Am. Dec. 755.

Skillen vs. Endelman (N. Y. 11 Am. B. R. 766, 768.

Hedges vs. Polhemius, 30 N. Y. Sup. 556.

In re: Volence (N. Y.) 197 Fed. 232.

In the latter case the District Court for the Southern District of New York reviews New York's leading authorities upon the question, and quotes approvingly the language of Russell vs. Winne, as follows:

> "I think it entirely settled that, if a mortgage be one which, by reason of the fraudulent purpose and intent with which it is executed, is declared void by the statute, it is wholly void, notwithstanding it

may include property as to which it would be valid if it could be regarded as a mortgage of that only. To speak more clearly, if a mortgage be given with the fraudulent intent to cover up and conceal from creditors a portion of the debtor's property, it is altogether void, notwithstanding it also includes land or other property in relation to which there is a bona fide intend to convey it as security for an honest debt, and no other purpose and intent. A mortgage, void in part as a violation of the statute, is void altogether."

SOUTH DAKOTA.

Greeley vs. Winsor (S. Dak.) 15 S. Dak. 117, 618; 45 N. W. 325, 326.

The South Dakota court in the above case follows the general trend of authority and what is believed to be the better doctrine, and bases its conclusions upon the following reasoning:

"The mortgage was upon 'goods, merchandise, furniture and fixtures.' The permission to sell covered only 'such goods as are sold in the usual course of retail trade.' Is the mortgage prima facie fraudulent *in toto,* or is it good as to the furniture and fixtures, they evidently not being included in the permission to sell? The law condemns such a mortgage as this, not because its terms prove any fraudulent or corrupt motive on the part of those who made or those who took it, but because such a mortgage furnished such easy facil-

ities for fraud, and is so well adapted to accomplish unfair and fraudulent results as to put it under the ban of suspicion. It *is condemned not because the transaction was inspired by a bad intent, but because it naturally leads to bad results.* If it were the actual proved intent of the parties which fixed the character of this instrument as fraudulent, it would hardly be contended that because they intended to and did reserve the furniture from the operation of this vicious power of sale, the mortgage ought to be held good as to them, but upon the familiar principle that every man must be presumed to have intended the natural and legitimate results of his acts, the law substitutes the effect for the intent, and it has found that the effect of such provisions is ordinarily bad, it assumes that the intent is ordinarily, or in other words, presumptively bad.

There are other reasons for applying this rule to the entire mortgage provisions in this case. The mortgagee, while claiming to have security upon all this property, has stipulated and consented that the mortgagor might gradually by retail sales deplete and consume the bulk of his security, leaving the burden of the debt, not upon the entire property, which he pretends to hold under, and which he protects by his mortgage, but upon the furniture and fixtures which alone, of all the mortgaged property, is to remain under the lien of his mortgage, and must constitute his real ~~property~~ security." (Italics ours)

It may not be amiss, in passing, to state that the latter reason assigned is in conformity with the view

of Dean Bigelow, expressed in his work on the Law of Fraudulent Conveyances (1911). This eminent writer is of the opinion that the better authority is that adopted by the court below, from which this appeal has been taken. Says Dean Bigelow, page 294 (note):

> "It is not necessary that the debtor should be able to sell the whole property for his own use to make a case of fraudulent intent, if he can sell or dispose of any of it, that is enough,"

and then (returning to the text) says:

> *"The favored creditor has not been paid, and still calls for payment out of the property mortgaged . . . That is to say, he has allowed the debtor to have to his own benefit part of the property within the lien, when that might have been enough to pay the debt, and yet required the other creditors to stay their hands until he can make good his claim out of what is left. All that is in contemplation when the mortgage was executed—for it is the natural effect of the terms of the mortgage."*

TENNESSEE.

Bank of Rome vs. Haselton, 15 Lea. 216, 238.

Bank vs. Brier, 95 Tenn. 331, 338.

Somerville vs. Horton, 4 Yerger (Tenn.) 541; 26 Am. Dec. 242, 246.

The doctrine in Tennessee has already been adverted to and the decision in the case of Bank of Rome vs. Haselton has been quoted at great length, and need be merely referred to in this connection.

KANSAS, NEW JERSEY, WEST VIRGINIA.

Wallach vs. Wiley, 28 Kans. 97, 107.
Holt vs. Kremer, 34 N. J. Eq., 181, 187.
Chaffin vs. Foley, 22 W. Va. 434, 441.

The cases in these states, while not so thoroughly considered as in the states above mentioned, yet hold the doctrine that a mortgage void in part is wholly void.

From the above discussion it may be seen that in all the states the basis for holding that a mortgage of the kind under discussion is void, is primarily that it was fraudulently entered into, and the majority of the cases hold that this fraud is conclusive because of the pernicious effect of permitting a mortgagor to continue in the use of property with power of sale thereof, or any part thereof, without applying the proceeds upon the mortgage indebtedness, and at the same time enabling the mortgagor to place his property beyond the reach of his general creditors. All the courts, among them, the Supreme Court of Oregon, that hold to such a view, that have passed upon the question as to whether a mortgage may be void in part without being void totally, have held to the effect that a mortgage void in part must be totally void, and this conclusion must of necessity follow, if the

premise be conceded, that a mortgage which permits the mortgagor to continue in the possession of property with unlimited power of sale thereof, without an accounting, is fraudulent as to the creditors, because of the conclusively presumed intent with which the mortgage was entered into. If the mortgage is fraudulent and void at its inception, the property covered thereby is not capable of being segregated into void parcels and valid parcels. The *mortgage* is void. And that this is the law in Oregon is apparent. For example, the court, in the case of *Bremer & Co. vs. Fleckenstein & Mayer,* 9 Ore. 266, 273, in speaking of such a provision, and after concluding that the mortgage is fraudulent and void as to the creditors, says:

> "And yet its obvious effect was to ward off his creditors and hinder and delay the collection of their demands against them, and the appellants must be presumed to have so *intended.* We have no hesitation in declaring such an arrangement as a fraud upon the creditors, and cannot be upheld."

It is submitted, therefore, without further prolonging this brief, that the mortgage in this matter is void *ab initio,* and being void *ab initio,* the invalidity thereof inheres of necessity in all of it, and that it must of necessity be void in toto.

The appellant states, on page 29 of his brief, that all the cases in accord with the doctrine of *Russell vs. Winne,* 37 N. Y. 591, are either cases of actual fraud as distinguished from constructive fraud, or cases which practically "without comment" follow these cases as an authority, and further states that most of the cases show actual fraud, citing *Wilson vs. Voight,* 9 Colo. 614, 619, Greeley vs. Winsor, 1 S. Dak. 117, 122, and another case.

Neither of these two cases cited show any "actual" fraud, and both of them specifically negative "actual" fraud.

That the cases in accord with Russell vs. Winne do not follow that authority without "comment" (which is assumed to mean "reasoning") is demonstrated by a mere perusal of so much of the opinions as are quoted herein.

In fact, the logical discussion of many of the cases in accord with Russell vs. Winne is so cogent and forcible that counsel for appellee in this brief deems it unnecessary to append even a resume thereof, nor to encumber this brief with language of his own which could not be as convincing as the excerpts which have been inserted under appropriate headings herein.

We will, therefore, close this brief with one or two observations as to certain phases of appellants argument.

Reference is made in appellant's brief to the case of Etheridge vs. Sperry, 139 U. S. 266, 271, in such a manner as, unwittingly, of course, to leave an impression that this case holds in accordance with appellant's present contention. As a matter of fact, the question of void in part, void in toto, did not in any way arise, all of the property mortgaged being shifting in character with unrestricted right of possession and sale by the mortgagor. The Iowa courts had held in accordance with the Oregon doctrine and the Supreme Court of the United States followed these decisions (the case arising in Iowa) though indicating that if the proposition were an original one and the court were not bound by the state decisions, it would have reached a different conclusion.

In commenting upon the case of Bremer & Co. vs. Fleckenstein & Mayer, appellant calls attention to the fact that in the lower court the proceeds of the sale of the shifting stock were segregated from the proceeds of sale of the stationary fixtures, and Bremer's recovery was confined to the sum of $200.00, representing the proceeds of the sale of the shifting stock, whereas, Bremer's claim was for the amount of $289.00. Appellant then asks, *arguendo,* at page 16 of its brief, "If the Supreme Court thought the mortgage void in toto, why did it not permit Bremer & Company to recover the full amount of its judgment instead of limiting it to the amount at which the stock of goods was valued? Why did they not recover $289.00 instead of simply $200.00?" And appellant thereupon states that he sees no explan-

ation other than that the court approved of the segregation of the void from what appellant thinks was the valid. As a matter of fact, the explanation was not far to seek. It was distinctly pointed out to the appellant in the opinion of Judge Wolverton in the instant case. The appeal in the case of Bremer vs. Fleckenstein was taken by Fleckenstein. Bremer was apparently satisfied with the $200.00 recovery and did not file any cross appeal, hence, the Supreme Court of Oregon, under the Oregon practice, had no jurisdiction to award any larger sum to Bremer than that which he procured in the court below. (See opinion of Judge Wolverton, Printed Transcript of Record, pages 32-35.)

It may be also noted *passim,* that the doctrine in the instant case has been heretofore held to be the law of Oregon by the United States District Court for the District of Oregon in at least two cases, both of which, unfortunately, are unreported. We refer to the cases of

In re: *M. Klorfein, Bankrupt* (In Bankruptcy No. 2250).

In re: *Snyder, Bankrupt* (In Bankruptcy No. 2275).

The occupants of the United States District Court bench in Oregon have both rendered illustrous service as members of the Supreme Court of the State of Oregon, and we assume that it will not be deemed amiss to refer to this fact in view of the rule followed by the United States courts of adopting, in questions such as

that here involved, the law as it exists in the state in which the case arises.

Respectfully submitted,

SIDNEY TEISER,

Attorney for Respondent and Appellee.